

(25,542)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 712.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, AND MINNEAPOLIS EASTERN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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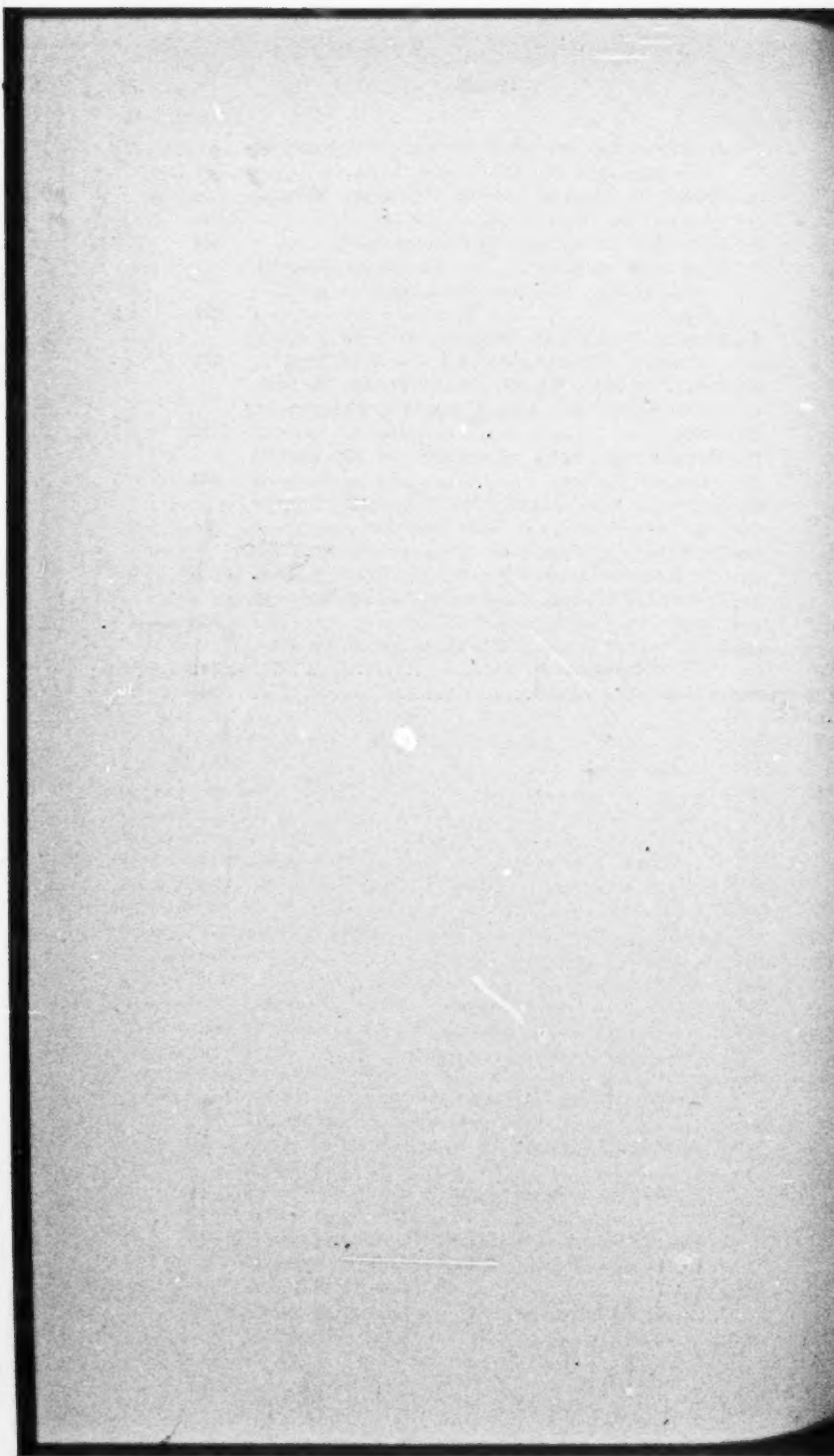
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1 Before the Railroad and Warehouse Commission of the State of Minnesota.

In the Matter of the Petition of the Minneapolis Civic and Commerce Association Against The Chicago, Milwaukee & St. Paul Railway Company and The Chicago, St. Paul, Minneapolis & Omaha Railway Company, Involving Switching Charges on the Line of the Minneapolis Eastern Railway Company of Minneapolis.

Summons.

To the Above Named Carriers:

You, and each of you, are required to satisfy the petition of the above named petitioners, a copy of which is hereto annexed and herewith served on you, and grant the relief demanded therein within twenty (20) days after the service of this notice upon you, exclusive of the date of such service, or show cause, by answer, why such relief should not be granted, and file said answer with the Railroad and Warehouse Commission at its office in the New Capitol Building, St. Paul, Minnesota, and mail copy of said answer to the petitioner at the Chamber of Commerce Building, Minneapolis.

Dated at St. Paul, Minn., October 21, A. D. 1912.

By the Commission.

[SEAL.]

A. C. CLAUSEN, *Secretary.*

(Title of Cause.)

Petition.

The Minneapolis Civic & Commerce Association would respectfully show and state:

1. That your Petitioner is a corporation duly created, organized and existing under and by virtue of the Laws of the State of Minnesota, and has as its object and purpose, the betterment of civic and industrial conditions in the City of Minneapolis and territory thereof, and adjacent thereto.

2. That the Minneapolis Eastern Railway Company is a corporation; that its stock is owned by the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, likewise corporations; that said corporations last named, for many years last past, have been and now are engaged in the operation of extensive lines of railway throughout said State of Minnesota and elsewhere including, as your petitioner is informed and believes, the subsidiary terminal known as the Minneapolis Eastern Railway Company, and that the lines of said latter corporation lie within the said City of Minneapolis; that the same is merely a switching facility whose sole purpose is to serve

industries located thereon to facilitate the transfer of freight between the lines of the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the lines of other railway companies serving the City of Minneapolis.

3. That for many years last past common rates have been applied between all points upon the lines of said Chicago, Milwaukee & St. Paul Railway and the Chicago, St. Paul, Minneapolis & Omaha Railway and St. Paul, Minneapolis and Common Points, including Stillwater and Hopkins, Minnesota; that in addition thereto and in violation of law, it has been for many years last past and now is the practice and custom of said Chicago, Milwaukee & St. Paul Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company to impose upon such so-called line traffic an additional switching charge for account of the Minneapolis Eastern Railway Company.

4. That the said charge imposed by the said Chicago Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company for said service upon the line of said Minneapolis Eastern Railway Company, as hereinbefore set forth, is unreasonable, unlawful and contrary to established custom, rules and regulations applicable to other commercial and industrial centers served by defendant carriers.

5. That in truth and in fact, the said Minneapolis Eastern Railway Company is but a part of the terminals of said Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company and that the imposition of said so-called additional switching charge, is but an indirect, covert and unlawful way of thereby increasing the amount which said defendant carriers may charge for service over their respective lines; that said so-called Minneapolis Eastern Railway Company is a mere device in furtherance thereof.

6. That in local or industrial service as between an industry located upon said Minneapolis Eastern Railway and an industry reached directly or indirectly by one or both of the owner lines, a charge is assessed for account of the Minneapolis Eastern Railway over and above that of the defendants herein and that the aggregate of such charges is excessive, unjust and illegal in that said Minneapolis Eastern Railway is in fact a part of the terminals of said "Milwaukee" and "Omaha" Railroads.

Wherefore, Petitioner prays that your Honorable Body shall proceed to investigate the matters hereinbefore set forth and direct that on all line traffic transported by said Chicago, Milwaukee & St. Paul Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company shall be handled by said Minneapolis Eastern

5 Railway Company without the imposition of said so-called switching charge, and that the defendants be required to treat this switching line as part of their own terminals in this community; that defendants be further required to publish and maintain switching tariffs applicable to local or industrial traffic, which shall be fair and reasonable in and of themselves the same to apply to and from

all industries served by the Minneapolis Eastern Railway Company without assessment of separate or additional charge therefor, and that they be required to treat this switching line as it is in fact, a part of their own terminals.

MINNEAPOLIS CIVIC & COMMERCE
ASSOCIATION, *Petitioner,*

By W. P. TRICKETT, *Traffic Director.*

STATE OF MINNESOTA,

County of Hennepin, ss:

W. P. Trickett being first duly sworn, deposes and says that he has read the foregoing petition and that the matters stated therein are true to the best of his knowledge and belief.

W. P. TRICKETT.

Subscribed and sworn to before me this 17th day of October, 1912.

[NOTARIAL SEAL.]

AGNES M. HODGE,

Notary Public, Hennepin County, Minn.

My term expires on the 13th day of November, 1918.

6

(Title of Cause.)

Answer of C., M. & St. P. Ry. Co., C., St. P., M. & O. Ry. Co.

Answering the complaint herein the said Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company admit the several allegations composing paragraph 1 of said complaint;

They deny that they operate, or that their lines of railway include, the Minneapolis Eastern Railway; or that the said Minneapolis Eastern Railway is merely such switching facility as in said complaint alleged.

Save as aforesaid these respondents admit the several allegations composing paragraph 2 of said complaint.

And on the contrary they aver that the said Minneapolis Eastern Railway Company was organized under the general laws of Minnesota in the year 1878, and that its Articles of Incorporation were, on the 27th day of January, 1879, so amended that the general nature of the business to be by it transacted was defined, and has ever since continued, to be, as follows:

"Article I.

The name of this corporation is The Minneapolis Eastern Railway Company, and the general nature of the business to be transacted by the said corporation is the building and operating a railway from the City of Minneapolis in the County of Hennepin, and State of Minnesota, to the City of Saint Paul, in the County of Ramsey, in said State, with branches connecting, with any and all railroads now built or hereafter to be built or secured or con-

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structed to or into the said Cities or either of them; also branches to mills and manufactories in said cities or in either of them; the said railway and branches to be constructed and operated with one or more tracks and with all necessary side tracks, turn-outs and connections, and all necessary roadway, rights of way, depot grounds, yards, machine shops, warehouses, elevators, depots, station houses, structures, buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway."

By such incorporation the said Minneapolis Eastern Railway Company was clothed with all rights and powers of a railway corporation conferred by such laws.

Save as aforesaid these respondents deny each and every allegation of said complaint.

Wherefore the said Railway Companies ask that the said complaint be dismissed.

F. W. ROOT,

Attorney for C., M. & St. P. Ry. Co.

J. B. SHEEAN,

Attorney for C., St. P., M. & O. Ry. Co.

8-65

(Title of Cause.)

The above entitled matter came on for hearing before the Commission on December 21st, 1912, at 10 o'clock A. M., and the following proceedings were had and testimony taken, to-wit:

The following are the appearances:

For Complainants: Francis B. James, Esq., W. P. Trickett and W. R. Gray, Frank J. Morley & Geo. T. Simpson.

For Defendants: O. W. Dynes and F. W. Root and J. T. Conley for the C. M. & St. P. Railway Co. J. B. Sheean for the C. St. P. M. & O. Railway Co.

Mr. Staples: I think the Minneapolis-Eastern should be made a party, and the records may show that; and a formal order will be made to that effect later.

Mr. Sheean: The Minneapolis-Eastern having been made a party of record, we make our appearances also as counsel for the Minneapolis Eastern Railway Co.

* * * * *

66

(Title of Cause.)

Findings and Order of Commission.

This petition was brought on behalf of the Minneapolis Civic & Commerce Association for the purpose of having the Commission determine that the Minneapolis Eastern Railway Company is a part of the terminals of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Chicago, Milwaukee & St. Paul Railway Com-

pany, and to forbid the imposition of a switching charge of \$1.50 per car upon all line haul traffic transported by the said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, which is handled by the Minneapolis Eastern Railway Company, and to require the defendants to publish and maintain switching tariffs applicable to local or industrial traffic which shall be fair and reasonable in and of themselves, the same to apply to and from all industries served by the Minneapolis Eastern Railway Company without assessment of separate or additional charge therefor. No testimony was presented which challenged the reasonableness of the charges made by the Minneapolis Eastern Railway Company in and of themselves, and hence that part of the petition is dismissed without further consideration.

After considering all the evidence, the Commission finds:

1. That the Minneapolis Civic & Commerce Association is a corporation duly organized under the laws of the state of Minnesota, and has as its object and purpose the general betterment of civic, commercial and industrial conditions in the city of Minneapolis, and the territory thereof and adjacent thereto.

2. That the Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation organized under the laws of the state of Wisconsin, and operates as a common carrier 1,672.71 miles of railroad, of which 431.72 miles are within the state of Minnesota, and that it has important and extensive terminals within the City of Minneapolis.

3. That the Chicago, Milwaukee & St. Paul Railway Company is a corporation organized under the laws of the state of Wisconsin and operates as a common carrier 9,373.31 miles of railroad, of which 1,241.75 miles are within the state of Minnesota, and that it has important and extensive terminals within the city of Minneapolis.

68 4. That the Minneapolis Eastern Railway Company is a corporation organized under the laws of the State of Minnesota in 1878, and that its articles of incorporation were, on the 27th day of January, 1879, amended so that the general nature of its business was "the building and operating a railway from the city of Minneapolis in the county of Hennepin, and state of Minnesota, to the city of St. Paul, in the county of Ramsey, in said state, with branches connecting with any and all railroads now built or hereafter to be built or secured or constructed to or into the said cities or either of them; also branches to mills and manufactories in said cities or either of them; the said railway and branches to be constructed and operated with one or more tracks and with all necessary side tracks, turnouts and connections, and all necessary roadway, rights of way, depot grounds, yards, machine shops, warehouses, elevators, depots, station houses, structures, buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway." Said railroad claims to own 4.75 miles of railroad and actually operates but 2.63 miles thereof, of which 1.07 is main

line track and 1.56 miles is yard track and sidings. The balance of 1.02 miles is located on the East side of the Mississippi River and is now operated by the Great Northern Railway Company. The company was organized by the millers of Minneapolis and all of the

69 members of the first board of directors were engaged in the milling business. About four years after its organization the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company became the owners thereof by each acquiring one-half of its capital stock, then issued to the amount of \$30,000.00. Instead of paying dividends on this stock from 1882 to 1906 the company invested its surplus, amounting to \$95,000.00, in improvements and additions, and in 1906 it capitalized these investments and the stock then issued was equally divided between its stockholders. The original issue of 7% first mortgage bonds in the sum of \$150,000.00 was guaranteed by the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and Chicago, Milwaukee & St. Paul Railway Company, and these were refunded by the issue of 4½% bonds in the same amount on January 1, 1909, of which \$75,000.00 is owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Co. and \$75,000.00 by the Chicago, Milwaukee & St. Paul Railway Company. Interest upon the bonds is paid regularly to the railroad companies.

5. That the Minneapolis Eastern Railway Company serves numerous large industries which are located upon its tracks, and that the receiving and delivering of line haul cars to and from the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and Chicago, Milwaukee & St. Paul Railway Company is of great advantage to said companies, as it enables them to control important traffic to and from mills and elevators. That the following named industries are located upon the tracks of the said railway:

70 Barber Milling Company, "Cataract Mill"; New Occidental Milling Company, "Occidental Mill"; Northwestern Consolidated Milling Company, "B" Mill, "C" Mill, "D" Mill, "E" Mill, "H" Mill, "Excelsior Warehouse"; Pillsbury Flour Mills Company, "C" Warehouse, "B" Mill, "B" Elevator, "Palisade Mill"; Washburn Crosby Company, "D" Mill.

6. That the rate fixed in the tariff of the said Minneapolis Eastern Railway Company for handling inbound carloads of \$1.50 per car, and for outbound carloads ten cents per ton with a minimum of \$1.50 per car, and that grain is the principal inbound and flour the outbound shipment; that said company issues no billing upon freight and makes no direct charge against a shipper; except in a few cases.

7. That large mills and elevators in Minneapolis are also located upon the tracks which are exclusively owned and controlled by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and by the Chicago, Milwaukee & St. Paul Railway Company, and that the service performed in handling cars to and from said mills and elevators is substantially the same as that which is performed in the handling of cars to and from the Minneapolis Eastern Railway Company; that the charge made by the Chicago, St. Paul, Minneapolis &

Omaha Railway Company, or Chicago, Milwaukee & St. Paul Railway Company for delivering a car of grain to a mill or elevator located upon the tracks of the Minneapolis Eastern Railway Company

71 is \$1.50 per car in addition to the line rate from the point of origin, while there is no charge made by either company in addition to the line rate for delivering a car to a mill or elevator located upon the rails exclusively operated by the Chicago, St. Paul, Minneapolis & Omaha Railway Company or the Chicago, Milwaukee & St. Paul Railway Company.

8. That by its absorption tariff the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company absorb the switching charge made against all outbound carloads upon which it enjoys a line haul coming from the mills and elevators located upon the tracks of the Minneapolis Eastern Railway Company, and that from a practical standpoint shippers of inbound grain are the only persons who have to pay the charge of the Minneapolis Eastern Railway Co.

9. That the Minneapolis Eastern Railway Company is managed and operated by its board of directors who are now and for a long period of time have been officers of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and who receive their entire compensation from said railway companies. That the general control of said company is in charge of a managing committee consisting of Mr. A. W. Trenholm, General Manager of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Mr. J. H. Foster, General

72 Superintendent of the Chicago, Milwaukee & St. Paul Railway Company. A superintendent is employed and he hires the switchmen, enginemen, car repairers and other employees, and they are paid by the Minneapolis Eastern Railway Company. The Company owns its own equipment and performs services for all railroads on equal terms.

10. That the said Minneapolis Eastern Railway Company files its annual reports and its tariff with the Interstate Commerce Commission and the Minnesota Railroad and Warehouse Commission as provided by law, and pays taxes to the state upon its gross earnings, and in said reports it claims to be a switching road and claims that the control by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company is direct.

11. That the tracks operated by the Minneapolis Eastern Railway Company are an important, convenient and necessary terminal facility for the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and that said companies do directly influence, control and operate said company.

As a conclusion of law from the foregoing facts, the Commission finds that the certain 1.07 miles of main line track and 1.56 miles of yard tracks and sidings including ground and all railway facilities, which are operated by the Minneapolis Eastern Railway Company, is a part of the terminal property of the Chicago, St. Paul,

73 Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company; that it is the duty of said railway companies, and each of them, without charge to deliver to, or receive from industries located upon said terminals, carload shipments upon which they, or each of them, receive a line haul; that the charge of \$1.50 per car on inbound grain which is delivered to mills and elevators located upon the rails now operated by the Minneapolis Eastern Railway Company gives an unlawful and unjust preference and advantage to mills and elevators located upon the rails which are exclusively owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company.

It is therefore ordered that the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and the Minneapolis Eastern Railway Company, and each of them, cease and desist from charging \$1.50 per car for handling inbound shipments over the lines of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company and each of them, which are delivered by the Minneapolis Eastern Railway Company to mills or elevators located upon the tracks now operated by the same, or delivered by said company to connecting carriers and that said Minneapolis Eastern Railway Company cease and desist from charging \$1.50 per car or any other sum for delivering carload shipments of freight moving from connecting carriers to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, or each of them, or from mills and elevators located upon the tracks now operated by said Minneapolis Eastern Railway Company to the said Chicago, St. Paul, Minneapolis & Omaha Railway Co. and Chicago, Milwaukee & St. Paul Railway Company, or each of them, and that said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and each of them, be, and the same are hereby required to operate said main track, yard track and siding as a part of the terminal property of each of said railroads within the city of Minneapolis. This order shall apply only on intrastate shipments of freight, and shall take effect on the first day of February, A. D. 1915.

By order of the Commission.

[SEAL.]

A. C. CLAUSEN, *Secretary*.

Dated at St. Paul, Minnesota, January 8th, A. D. 1915.

Memorandum.

As a general proposition of law the mere fact that the stock of one railroad company is owned by another does not make them one system. Pullman Car Co. v. Missouri Pacific, 115 U. S. 587; Connelly v. Mathieson Alkali Works, 190 U. S. 406; Peterson v. C. R. I. & P., 205 U. S. 364; Interstate Commerce Commission v.

Stickney, 215 U. S. 98; U. S. v. D. & H. Company, 213 U. S. 366.

But where a corporation directly controls and operates the corporation whose stock it owns the two should be considered as a single system. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; U. S. v. St. Louis Terminal, 224 U. S. 383; State ex rel. v. Standard Oil Co., 49 Ohio State 137; People v. N. R. S. R. Co., 121 New York 582; "Mortawetz on Private Corporations," Vol. 1 Sec. 227; "Thompson on Corporations," Second Edition, Vol. 1, Sec. 10.

In the case of Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. page 498, Mr. Justice McKenna said at page 521:

"Another important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the company if we regard only their characters; there is a union of them if we regard their control and operation through the Southern Pacific. This control and operation are important facts to dispose of."

Mr. Justice McKenna further said at page 533:

"In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company and cite cases which establish it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which is content to hold; it presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with a system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have in a sense separate corporate operation; but they are directed by the same paramount and binding power and made single by it. In all transactions it is treated as single."

The courts have recognized that there is a difference between railroad transportation companies and terminal companies. The terminal company is an instrumentality which assists the railroad company in the transfer of traffic between different lines and in the collection and the distribution of traffic. They are a modern evolution in the doing of railroad business and are of the greatest public utility. U. S. v. Terminal Association, 224 U. S. 56, Law Edition 810; State v. St. Paul Union Depot Co., 42 Minn. 142; St. Paul Union Depot Co. v. Minnesota & Northwestern R. R. Co., 47 Minn. 154. While the Commission recognizes the legal right of railroad companies to own and control terminal companies, it believes that the law does not permit such ownership and control to be used as a device for increasing transportation or terminal charges.

Appeal from above order of the Railroad & Warehouse Commis-

sion was duly taken to the District Court of Hennepin County, Minnesota.

77 STATE OF MINNESOTA,
County of Hennepin:

District Court, 4th Judicial District.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Complainant,
vs.

MINNEAPOLIS EASTERN RAILWAY COMPANY, CHICAGO, ST. PAUL,
Minneapolis & Omaha Railway Company, and Chicago, Milwaukee & St. Paul Railway Company, Defendants.

The above entitled matter being regularly on the general term calendar of the above named Court for September, 1915, came on for trial before the Honorable William C. Leary, one of the Judges of said Court, on the 14th day of September, 1915, and was tried on the 14th and 15th days of September, 1915.

Frank J. Morley, Esq., appeared as attorney for the complainant; Honorable Lyndon A. Smith, Attorney General, on behalf of the State of Minnesota, and the Railroad Commission; and J. B. Sheean, Esq., appeared as attorney for the defendant, the Chicago, St. Paul, Minneapolis & Omaha Railway Company; F. W. Root, Esq., appeared as attorney for the defendant, the Chicago, Milwaukee & St. Paul Railway Company; and W. H. Norris, Esq., appeared as attorney for the defendant, the Minneapolis Eastern Railway Company.

78 Mr. Morley: I think the Court has read the findings of the commission and is acquainted with the nature of the proceedings. After talking with General Smith last night, we have modified our plan of procedure somewhat. We had intended merely to offer in evidence the order made by the commission and the findings of fact contained therein and rest. (Sec. 4192.) I talked with Mr. Root last night and he seemed to think it would simplify proceedings if in addition to offering in evidence the findings of the commission we would proceed and offer further testimony. We can offer certain additional testimony which we did not intend to put in the case at this time, but it will not be possible for us to put in our entire case at this time.

Mr. Sheean: That would be entirely satisfactory. We wish to waive any formality or technicality or any objection to the testimony that it is incompetent. Cases of this kind are usually conducted informally and although we want to preserve the record, we wish at the same time to expedite the proceedings. Don't you think it might be well for one of the parties to state specifically what is involved? The main question at issue is the lawfulness of the order made by the commission.

79 Mr. Morley: In the trial of the case involving the Railway Transfer Company, Mr. Bremner and Mr. Smith and myself went over the findings of the commission and agreed upon certain findings which would be admitted by all parties.

Mr. Sheean: If we could have an opportunity to check that over.

Mr. Morley: The first finding is in effect that the plaintiff was a corporation—

Mr. Sheean: The first, and second and third paragraphs are admissible.

Mr. Morley: No. 4 "That the Minneapolis Eastern Railway Company is a corporation organized under the laws of the state of Minnesota in 1878, and that its articles of incorporation were, on the 27th day of January, 1879, amended so that the general nature of its business was 'The building and operating a railway from the city of Minneapolis in the county of Hennepin, and state of Minnesota, to the city of St. Paul, in Ramsey county, in the state of Minnesota, with branches connecting with any and all railroads now built or hereafter to be built or secured or constructed to or into the said cities or either of them; also branches to mills and manufactories in said cities or either of them; the said railway and branches to be constructed and operated with one or more tracks and with all necessary side tracks, turn outs and connections, and all necessary roadway, rights of way, depot grounds, yards, machine shops, warehouses, elevators, depots, station houses, structures, buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway.'

Said railroad claims to own 4.75 miles of railroad and 80 actually operates but 2.63 miles thereof, of which 1.07 is main line track and 1.56 miles is yard track and sidings. The balance of 1.02 miles is located on the east side of the Mississippi River and is now operated by the Great Northern Railway Company. The company was organized by the millers of Minneapolis and all of the members of the first board of directors were engaged in the milling business. About four years after its organization the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company became the owners thereof by each acquiring one-half of its capital stock, then issued to the amount of \$30,000.00. Instead of paying dividends on this stock from 1882 to 1906 the company invested its surplus amounting to \$95,000.00 in improvements and additions, and in 1906 it capitalized these investments and the stock then issued was equally divided between its two stockholders. The original issue of 7% first mortgage bonds in the sum of \$150,000.00 was guaranteed by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and these were refunded by the issue of 4½% bonds in the same amount on January 1st, 1909, of which \$75,000.00 is owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and \$75,000.00 by the Chicago, Milwaukee & St. Paul Railway Company. Interest upon the bonds is paid regularly to the railroad companies."

Mr. Sheean: That will be assented to by defendants with the right to show that since that finding was made there has been an increase of trackage.

Mr. Morley: The only modification we expect to prove in that finding is that the reports of the company, the Minneapolis Eastern

Company, indicate the first issue of stock of \$30,000.00 was direct to the Omaha and Milwaukee railroads and that while the millers incorporated the company, the Omaha and the Milwaukee acquired the stock before the company began operating and furnished the means for building the road and have operated it at all times; and also that there was a dividend of 33 1-3 per cent on the outstanding stock paid in 1905.

Mr. Smith: I am going to say in this connection that while the state is here to support this order in its practical entirety, at the same time I think the facts just stated by Mr. Morley appear to be the true fact although somewhat conflicting with the statement near the bottom of the second page of the printed copy of the order, in this, that the evidence shows a very early relation between the Eastern Minneapolis road and the two roads that afterwards acquired its stock; that these two roads acquired the stock not four years after the organization but shortly afterwards and instead of not paying dividends on this stock from 1882 to 1896, there were some dividends declared and paid prior to 1906. We make no objection to the plaintiff showing these facts and think they should be shown so far as they are facts.

82 Mr. Morley: Paragraph 5. "That the Minneapolis Eastern Railway Company serves numerous large industries which are located upon its tracks, and that the receiving and delivering of line haul cars to and from the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company is of great advantage to said companies as it enables them to control important traffic to and from mills and elevators." (Down to that point you concede that finding?)

Mr. Sheean: That is contrary to the facts and the defendants will not concede that. The operation of this railroad is no greater advantage to the Omaha and the St. Paul road than it is to the Great Northern or the Northern Pacific from our standpoint.

Mr. Morley: The balance of the finding merely names the industries located upon the tracks of the railroad and is conceded by us.

Mr. Sheean: Defendants will accede to that finding.

Mr. Morley: Paragraph No. 6. That is conceded by us.

Mr. Sheean: "Except in a few cases." The Minneapolis Eastern as a matter of fact bills on all the railroads here for service performed by it and makes separate charges against shippers moving freight from one point on its line to another point on its line.

Mr. Morley: On local industrial movements the Eastern makes a direct charge and on all switching movements to or from
83 connecting carrier collects a charge from the carrier delivering the freight or receiving it?

Mr. Sheean: We may reserve the right to show the facts. I am not certain but what you are right, Mr. Morley.

Mr. Morley: Paragraph 7. "That large mills and elevators in Minneapolis are also located upon the tracks which are exclusively owned and controlled by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and by the Chicago, Milwaukee & St. Paul Railway Company, and that the service performed in handling

cars to and from said mills and elevators is substantially the same as that which is performed in the handling of cars to and from the Minneapolis Eastern Railway Company; that the charge made by the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company for delivering a car of grain to a mill or elevator located upon the tracks of the Minneapolis Eastern Railway Company is \$1.50 per car in addition to the line rate from the point of origin, while there is no charge made by either company in addition to the line rate for delivering a car to a mill or elevator located upon the rails exclusively operated by the Chicago, St. Paul, Minneapolis & Omaha Railway Company or the Chicago, Milwaukee & St. Paul Railway Company."

Mr. Sheean: The Minneapolis Eastern would deny that the services performed are the same. It will offer testimony to show that the services which it performs is different and it is more expensive.

Mr. Morley: "That the charge made by the Omaha and the Milwaukee Railroad companies"——

Mr. Sheean: I understand that to be correct.

Mr. Morley: That is conceded by us also.

No. 8.

Mr. Sheean: The Omaha has an absorption tariff which is substantially different from many of the roads entering Minneapolis and that is not correct literally speaking. The Omaha does not absorb except on competitive business and some of the other roads absorb on all business where the charge is fifteen dollars or an amount in excess thereof.

Mr. Root: The Milwaukee does not absorb in any case where the line freight does not amount to at least fifteen dollars or over.

Mr. Sheean: The tariff shows just what that is. With that exception the section is substantially correct.

Mr. Morley: No. 9. We have some evidence which we want to put in which you furnished us in support of that section.

Mr. Sheean: The Minneapolis Eastern excepts to that part of the finding that the railroad is operated by a board of directors. The railroad in fact claims it is operated by a superintendent and its managing directors.

Mr. Morley: Paragraph No. 10?

Mr. Sheean: I am not prepared to say what their reports show. I have not seen them.

Mr. Morley: The early reports, up to the time the case was tried before the commission, admitted that (control) but since the case was tried before the commission that admission was withdrawn.

Mr. Sheean: The defendants will concede the correctness of Counsel's statement in that finding subject to this suggestion, it is rather a finding of law than a finding of fact because the question of what constitutes "control" is a question of law and not of fact.

Mr. Morley: Paragraph No. 11?

Mr. Sheean: To that of course the Eastern and all the defendants object, that the finding of facts are a conclusion of law.

Mr. Morley: Plaintiffs offer in evidence plaintiff's Exhibit "A," being the findings and order of the commission.

The Court: Received.

Mr. Morley: We will offer the articles of incorporation of the Minneapolis Eastern Railway Company, plaintiff's Exhibit "B."

The Court: Received.

Mr. Morley: We offer in evidence the minutes of the directors of the Minneapolis Eastern of a meeting held October 25th, 1878, the minutes of an adjourned meeting held at two o'clock P. M. the same day and a further adjournment to October 26th, 1878, at two o'clock P. M. That is all one instrument, plaintiff's Exhibit "C."

The Court: Received.

Mr. Morley: Next we offer in evidence the contract between the Minneapolis Eastern Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul & Minneapolis Railway Company, which I think is conceded to be the previous name of the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Mr. Sheean: The Omaha Company was organized by a consolidation of the North Wisconsin and the Chicago, St. Paul & Minneapolis Railroad Company.

Mr. Morley: It is under date of October 25th, 1878, and as a part of the same exhibit we offer the supplemental agreement between the same parties dated December 20th, 1878, plaintiff's Exhibit "D."

The Court: Received.

Mr. Morley: As Plaintiff's Exhibit "E" we offer in evidence the minutes of the meeting at which amendments to the articles of incorporation of the Minneapolis Eastern Railway Company were adopted, the meeting being held January 27th, 1879.

The Court: Received.

Mr. Morley: As Plaintiff's Exhibit "F," we offer the minutes of a meeting of the directors of the Minneapolis Eastern Railway held June 20th, 1882 and of a meeting of the stockholders held the same day.

The Court: Received.

Mr. Morley: As Plaintiff's Exhibit "G" we offer in evidence the minutes of a meeting of the directors of the Chicago, Milwaukee & St. Paul Railway Company held at New York City August 9th, 1880, at two o'clock P. M.

The Court: Received.

87 Mr. Morley: As Plaintiff's Exhibit "H" we offer in evidence a copy of the by-laws of the Minneapolis Eastern Railway Company adopted June 20th, 1882.

The Court: Received.

Mr. Morley: As Plaintiff's Exhibit "I," we offer in evidence the minutes of various meetings at which amendments to the by-laws of the Minneapolis Eastern Railway Company have been passed.

The Court: Received.

Mr. Morley: As Plaintiff's Exhibit "J" we offer an extract from the directors' meeting of the Minneapolis Eastern Railway Company

held June 13th, 1906, at which additional capital stock was authorized.

The Court: Received.

Mr. Morley: As Plaintiff's Exhibit "K" we offer in evidence a copy of a resolution adopted at a meeting of the directors of the Omaha Railway Company held October 16th, 1908.

The Court: Received.

Mr. Morley: Just to clarify the record with respect to the exhibits we have offered, I will say we have been furnished with them in response to a subpoena served on the various defendants and I take it they are admitted to be correct copies of the originals.

Mr. Sheean: We have not objected to any of them and they are correct copies and I will say also that the minute books of the Omaha and Milwaukee and the Minneapolis Eastern are subject to your call or wish for examination. These have been furnished by the officer in charge of the duty of keeping them and have been forwarded to me as correct copies.

Mr. Morley: I particularly want to call attention to the contract, plaintiff's Exhibit "D," between the Eastern Railway and the Milwaukee and the Omaha dated October 25th, 1878. (Mr. Morley reads Exhibit "D.")

Mr. Morley: That is all the proofs we are prepared to put in at the present time. I might read into the record—

Mr. Root: If you have anything to consume the time, it would be desirable at this time.

Mr. Morley: I will furnish copies of this to Counsel. The only part I will read into the record is an excerpt from page 8 of the annual report of 1887 of the Minneapolis Eastern Railway Company reading, "When and to whom was the original stock owned by the company sold and what was the cash value realized by the company for the same? (A) The Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee and St. Paul Railway Company; cash realized, \$30,000.00."

Mr. Sheean: I would suggest that be held subject to the reading of the record itself. Until we see it is an accurate transcript from the annual report.

Mr. Morley: That is all right.

89 J. H. FOSTER, being first duly sworn, testified as follows:

The Court: Do I understand the Minneapolis Civic & Commerce Association rests at this time?

Mr. Morley: No. We want to put in additional evidence, in addition to the findings of the commission. We put in the foregoing exhibits at this time by agreement with Counsel and for the purpose of simplifying the proceedings.

The Court: Then you are simply through for the time being, Mr. Morley?

Mr. Morley: Yes, your Honor.

Witness examined by Mr. Sheean as follows:

Q. Where do you reside?

A. Minneapolis.

Q. What official position do you occupy with reference to the Minneapolis Eastern Railway Company?

A. Secretary and treasurer and one of the managing directors.

Q. Who is the president of that company?

A. Mr. F. A. Chamberlin.

Q. Where does he reside and what is his occupation?

A. He resides in Minneapolis and he is the President of the First and Security National Bank.

Q. Who are the other officers of the Minneapolis Eastern?

A. Mr. A. J. Earling is the Vice-president and Mr. A. W. Trenholm is one of the managing directors, Mr. W. H. Norris is Counsel.

90 Q. Have you a list of the officers of the Eastern Company?

A. I have. I thought I had it here, but I don't know but what I gave it to you. I have it here.

Q. Just state who are the directors? Well, you say the president, vice-president and general counsel have been stated. Who are the other general officers of the Minneapolis Eastern?

A. Mr. A. W. Trenholm is a managing director.

Q. How many managing directors are there?

A. Nine.

Q. Managing directors?

A. Two.

Q. You and Mr. Trenholm constitute the two managing directors?

A. Yes.

Q. What other general officers are there in addition to the president, vice-president and general counsel?

A. The secretary and treasurer would come under that head.

Q. Does that state all of the general officers, that includes the general officers does it?

A. Yes.

Q. Who are the directors of the Minneapolis Eastern at this time?

A. Mr. F. A. Chamberlin, Mr. T. A. Polleys, Mr. J. T. Clark, Mr. A. W. Trenholm, Mr. A. J. Earling, Mr. E. D. Sewell, Mr. W. A. Gardner, Mr. W. H. Norris, Mr. J. H. Foster.

Q. Have you a list of the present stockholders of the Minneapolis Eastern Railway?

91 A. Yes, sir.

Q. You may state, if it is only a short list,—you may state who are the stockholders of that company at this time?

A. And the amount of the stock held?

Q. Yes?

A. Mr. F. A. Chamberlin, 1 share; Mr. J. T. Clark, 1 share; Mr. J. H. Foster, 1 share; Mr. T. A. Polleys, 1 share; Mr. A. W. Tren-

holm, 1 share; Mr. W. H. Norris, 1 share; Mr. W. A. Gardner, 1 share; Mr. Marvin Hughitt, 620 shares; Mr. A. J. Earling, 621 shares. I should have stated there Mr. F. W. Root, 1 share.

Q. Where is the property of the Minneapolis Eastern Railway Company located? In what city?

A. Minneapolis.

Q. Have they an office building in the city?

A. They have.

Q. How many miles of trackage is owned by the Minneapolis Eastern Company?

A. 5.13 miles.

Q. How many miles of trackage is leased by it and used by it in addition to the amount you have stated as owned trackage?

A. .56 miles.

Q. Where is its property located with reference to the Mississippi River?

A. That of the Minneapolis Eastern located on the west side of the river is along the river bank and next to the mills.

Q. And part of its trackage is located also on the east side of the river?

92 A. We have some on the east side.

Q. What is the mileage of that located on the east side?

A. 2.10 miles.

Q. Who is operating that mileage at this time?

A. The Great Northern.

Q. Have you with you a blue print showing the property of the company?

A. I have.

Mr. Sheean: Two exhibits, marked 1 and 2, showing the property and the location of the Minneapolis Eastern Railway Company. You may explain,—I call your attention to the property located on the east side of the Mississippi river as shown by Exhibit 1 and you may state what the purple lines thereon indicate?

A. The right of way of the Minneapolis Eastern.

Q. The boundaries of its right of way?

A. Yes.

Q. And what do the yellow lines indicate thereon?

A. The trackage owned by the Minneapolis Eastern.

Q. Now, referring to Exhibit 2, you may state what the purple lines thereon indicate?

A. That is the boundary of the property of the right of way of the Minneapolis Eastern.

Q. What do the yellow lines indicate thereon?

A. The trackage on that property.

Q. What do the green lines indicate thereon?

93 A. The tracks owned by other companies and used under an agreement by the Minneapolis Eastern.

Q. That is the Great Northern?

A. Yes. I said owned by any other company.

Mr. Morley: That is the .56 miles mentioned?

Mr. Sheean: Yes, the green trackage shown on the map.

Witness: That is right, 56.

Q. This map is drawn to a scale?

A. Yes.

Q. And shows the trackage owned by the Minneapolis Eastern Railway Company?

A. It does.

Mr. Sheean: Defendants offer in evidence Exhibits 1 and 2.

The Court: Received without objection.

Q. Referring again to the organization of the Minneapolis Eastern Company who is your immediate subordinate on the Minneapolis Eastern?

A. Peter Houle, superintendent.

Q. How long has he been a superintendent of the Minneapolis Eastern?

A. I think he was appointed superintendent in 1910.

Q. Prior to that time what position did he occupy?

A. General yardmaster.

Q. What are the general natures of his duties?

A. Attending to the operation of the Minneapolis Eastern, to look after it.

Q. What other officer or employee there is in charge of part of the operations of the Minneapolis Eastern?

94 A. Mr. F. H. Burdick.

Q. What are his duties?

A. He is—his title is agent and bookkeeper for the Minneapolis Eastern.

Q. What has he to do with reference to the traffic of the company?

A. He looks after the traffic in connection with the company.

Q. Now, what equipment does the Minneapolis Eastern own and operate?

A. We have two locomotives.

Q. Have they car repairers?

A. One car repairer.

Q. Switchmen?

A. Yes, we have a regular equipment of switchmen with each engine.

Q. What is the average number of its employees?

A. That would vary with the business. I should say the average might be twenty men, sometimes it might run to thirty.

Q. Who has direct charge of the operation of the Minneapolis Eastern Railway?

A. Mr. Houle.

Q. And who has direct charge of its accounting and traffic business?

A. Mr. Burdick.

Q. To whom do they report to as their superior officer?

A. So far as the operation is concerned, they report to me.

Q. You have a managing director—

95 A. I will change that. So far as the operation is concerned they report to the managing committee.

Q. Consisting of yourself and Mr. Trenholm?

A. Yes.

Q. And your official position with the Milwaukee Company is what?

A. General superintendent.

Q. And Mr. Trenholm's official position with the Omaha is what?

A. General manager.

Q. Now, when do the stockholders of this company have their annual meeting?

A. I will read that part of the——

Q. I don't know as it is very material. They have a regular fixed annual meeting?

A. The Tuesday preceding the third Wednesday in September of each year.

Q. And do the directors have regular meetings and meet specially when the business demands it?

A. They have regular annual meetings and such special meetings as are necessary in the conduct of their business.

Q. Where is the principal place of doing business of the Minneapolis Eastern?

A. The directors meet in Mr. Chamberlain's office.

Q. In the city of Minneapolis?

A. Yes.

Q. And the stockholders meet likewise in the city of Minneapolis?

A. Yes, at the same time.

96 Q. Referring to your office building and the buildings of the Minneapolis Eastern, what have you with reference to buildings there,—coal sheds?

A. We have an engine house, an office,—the engine house office, coaling plants are all under the same roof you might say. It is one building.

Q. And such tools and handcars and matters of that kind as are necessary for the maintenance of your railroad?

A. We have a regular section crew.

Q. Referring to the contract of this company you may state whether or not the Minneapolis Eastern Company makes its own contracts?

A. It does.

Q. Have you a list of the contracts,—of the important contracts that are made during a number of years past?

A. I had the list, but I guess you have it now.

Q. I call your attention to Exhibit 3 and I will ask you whether or not that is just a general statement of the contracts which have been executed by the Minneapolis Eastern in its own name?

A. Yes, sir, all those contracts are on file in my office.

Q. In the secretary's office?

A. Yes and in the Minneapolis Eastern safe.

Mr. Morley: We have no objection to the exhibit being received.

Mr. Sheean: The exhibit is offered in evidence, defendants' Exhibit No. 3.

The Court: Received.

97 Q. In its dealings with the Omaha and the Milwaukee state whether or not separate and distinct contracts between them are executed?

A. Well, there is,—I don't just understand your question.

Q. Has the Minneapolis Eastern ever made any,—had occasion to make any contracts direct with the Milwaukee company?

A. Not during my time.

Q. Have they had occasion to make any contracts with the Omaha company?

A. No, sir, not since my time.

Q. No matters have arisen which called for any contracts between the companies?

A. No, sir.

Q. Now, who collects the revenues which are earned from the service rendered by the Minneapolis Eastern?

A. The Minneapolis Eastern collects the revenues.

Q. Where are these revenues deposited?

A. In the Security bank, the First and Security.

Q. Out of what funds are the employees of the Minneapolis Eastern paid?

A. Out of the funds earned and on deposit by the Minneapolis Eastern.

Q. That is,—in other words, the Minneapolis Eastern collects its own revenues and pays its own employees?

A. It does.

Q. And its operating expenses?

A. Yes.

98 Q. Where does the Minneapolis Eastern buy its principal purchases, for instance coal?

A. Buy on the open market wherever the Eastern can buy the cheapest.

Q. And that is true of all its supplies? Buys where it can buy the cheapest?

A. Yes, all supplies.

Q. Irrespective of where it is bought?

A. Yes.

Q. What was the,—briefly stating what are generally the supplies that the company has to purchase in the operation of its railroad?

A. Rails, switches, switch material, track tools, coal, stationery, ties,—everything that goes to make up the upkeep of a railroad,—oil.

Q. The general office supplies are also included in the list of necessities, are they?

A. Yes, sir.

Q. Does the Minneapolis Eastern keep its own books and own accounts?

A. It does.

Q. Before going into that, I want to refer to the revenues. Explain to the Court how this company collects its revenues?

A. Well, it collects its revenue on the business that it does just the same as any railroad would.

Q. Of whom does it collect its revenues?

A. In the majority of cases the line roads. The revenue is collected from the line roads. I think Mr. Burdick would be in position to explain that to you a little more clearly than I would.

(At this time a recess was taken until 2 o'clock P. M.)

99

Afternoon Session.

(Mr. FOSTER resumes witness stand for further direct examination.)

Q. What are the facts in respect to the Minneapolis Eastern Company making annual and special reports to the Interstate Commerce Commission?

A. They make such reports.

Q. Do they file a tariff with the Interstate Commerce Commission?

A. They do.

Q. Have they in Washington a legal representative as required by the Interstate Commerce act?

A. They have.

Q. And who is the representative of the Minneapolis Eastern in that particular?

A. Mr. Hume, Mr. R. S. Hume.

Q. With reference to the orders and notices to the company, they are served upon him as required by law?

A. They are.

Q. And he transmits the same to you?

A. Yes, sir.

Q. As secretary of the Minneapolis Eastern Company?

A. Yes, sir.

Q. The railroad companies follow the same proceedings, do they, with reference to such orders and notices issued by the Commerce Commission?

A. Yes, sir.

100 Q. What reports if any do the Minneapolis Eastern Company make to the Federal government in respect to such acts as the Safety Appliance Act, hours of service act, and other Federal acts?

A. They make all reports that are,—to the Federal government, that are required from any railroad and all railroads.

Q. In addition to the acts which I have enumerated there would be the boiler act and the reports of accidents?

A. Yes, sir.

Q. Does the Interstate Commerce Commission prescribe forms upon which you should make these reports?

A. They do.

Q. Who in fact makes out these reports and transmits them to the Interstate Commerce Commission?

A. Mr. Burdick.

Q. Do you as secretary execute any of them?

A. No, sir.

Q. What are the facts in respect to this company making like reports to the Railroad and Warehouse Commission of this state?

A. They make reports to the Railroad and Warehouse Commission.

Q. Annual reports, special reports and accident reports?

A. Yes, sir.

Q. Do you know whether or not the Minneapolis Eastern Company was required under the law and orders of the commission to value its property under the so-called valuation law of this state?

A. They are.

101 Q. And has that company thereafter complied with this law by making reports of additions and betterment to the property?

A. Yes, sir.

Q. What is the fact in respect to the Minneapolis Eastern Railway Company being required by the state to pay a tax upon its gross earnings?

A. They pay a gross earnings tax.

Q. Does the Minneapolis Eastern pay a corporate or license tax to the United States government?

A. An income tax, yes, sir.

Q. What are the facts in respect to the taxing and regulating bodies of this state treating the Minneapolis Eastern as a separate independent railway company?

A. Why, it is treated as an independent railway company in every respect.

Q. Has the company ever exercised the power of eminent domain?

A. Not since I have been connected with the company.

Q. Do your records show that it has exercised that right or power?

A. The old records, yes, sir.

Q. Does the company file its tariff, intrastate with the railroad and warehouse commission of Minnesota?

A. Yes, sir.

Q. And its charges are made on the basis of the tariff so filed with the state, the interstate commerce commission?

102 A. Yes, sir.

Q. State wherein the property owned and operated by the Minneapolis Eastern differs from mere terminal facilities or industry tracks?

A. I don't know that I understand just what you mean by that.

Q. I have reference particularly to the character of its roadbed and steel trestles and the cost of the plant?

A. The Minneapolis Eastern has opposite the flour mills and on the river side a steel trestle, I don't remember the length of it, but I think it is nearly or quite fourteen hundred feet in length.

and from thirty to forty feet in height. In addition to that we have a steel truss bridge. I believe that is about one hundred and fifty feet long.

Q. What would be the approximate cost of constructing such structures?

A. The only thing I know about that would be the,—you mean the structure itself? I could not give an estimate on that.

Q. Have you any idea about what those structures cost?

A. No.

Q. Do you know of any terminal facilities in the state of Minnesota or elsewhere or industrial trackage where such a costly investment was required in order to furnish service of that character?

A. No, I do not.

Q. In the particulars of cost and the character of construction, the Minneapolis Eastern property differs radically from that of any industry track or terminal trackage that you know of?

A. Yes, sir.

Q. Who was the president of the company last preceding Mr. Chamberlain?

A. I think it was Mr. J. S. Pillsbury. The records will show.

Q. A former governor of the state of Minnesota?

A. I think so.

Q. And who was his immediate predecessor?

A. I would have to look up the records to tell you.

Q. Could I refresh your recollection by naming Mr. Bassett?

A. I remember according to the records Mr. J. B. Bassett was a president of the Minneapolis Eastern Company, but I don't remember whether Mr. Pillsbury followed him or not.

Mr. Morley: We will admit that to be the fact.

Q. Neither Mr. Washburn or Mr. Pillsbury were officers in any way of the Milwaukee company,—I should say Mr. Bassett or Mr. Pillsbury,—neither of them were officers of the Milwaukee Company?

A. At that time?

Q. Yes?

A. Not that I know of.

Q. Nor were they officers of the Omaha company so far as you know?

A. Not that I know of.

Q. Now, what advantage if any does the Milwaukee company or the Omaha company derive from its stock ownership of the Minneapolis Eastern?

A. They do not derive any benefit at all so far as the business is concerned. The only way in which they would derive any benefit would be from dividends or interest upon the stock and bonds they own.

Q. Does the ownership of the Milwaukee company in any way secure any advantage over any other railroad in the securing of traffic or the like?

A. No, sir.

Q. Can you say the same to be true of the Omaha company?

A. The same is true of the Omaha.

Q. What are the facts respecting the treatment of all railroad companies in the handling of traffic and services rendered being the same by the Minneapolis Eastern?

A. All companies are treated alike.

Q. No discrimination of any kind?

A. None whatever.

Q. No advantage to any company by reason of the stock ownership of the Milwaukee or the Omaha company?

A. No, sir.

Q. Now, are the tracks of the Minneapolis Eastern Railway Company necessary terminal facilities of either the Milwaukee or the Omaha company?

A. I should say not.

105 Q. Any company owning or operating the Minneapolis Eastern would secure the same service for the Omaha or the Milwaukee company?

A. Absolutely.

Q. Who is your associate managing director?

A. Mr. A. W. Trenholm.

Q. You may state what directions if any have the directors of the Minneapolis Eastern Railway Company ever given you or Mr. Trenholm, as managing directors, in respect to the operation of the Minneapolis Eastern Railway Company?

A. None whatever.

Q. Mr. Trenholm and you are both practical operating officials of other roads, are you?

A. Well, we think we are.

Q. In the matter of operation, it is in the hands of the managing directors and so far as you know the other directors of the company have not directed or controlled the actual operation of the Minneapolis Eastern?

A. No, sir.

Q. Has any officer or director of the Milwaukee company ever controlled or attempted to control or directed any of the operations of the Minneapolis Eastern?

A. Never.

Q. Has any officer of that company ever attempted to dictate or determine the policy of the Minneapolis Eastern?

A. Not since I have been connected with it.

Q. How long have you been connected with it?

A. Since 1907, in June or July.

106 Q. Have the stockholders or directors of the Milwaukee Company ever controlled or attempted to control the operation or management of the Minneapolis Eastern?

A. No, sir. Not since my time.

Q. Has any officer or director of the Omaha company ever controlled or attempted to control or direct the operation of the Minneapolis Eastern?

A. Not through me.

Q. Have the directors of the Omaha company proper or any of its stockholders attempted to dictate or control the operation or policy of the Minneapolis Eastern?

A. No, sir, not that ever came to my notice.

Cross-examination.

Examined by Mr. Morley:

Q. You have been a member of the managing committee of the Minneapolis Eastern since 1907?

A. July, 1907.

Q. And you became a member of the managing committee at the same time you became superintendent of the Milwaukee road?

A. No, sir.

Q. Approximately the same time?

A. No, sir. I became connected with the Minneapolis Eastern when I took the position as assistant general superintendent of the Milwaukee road in Minneapolis.

Q. That was in 1907?

A. Yes.

Q. When did Mr. Trenholm become a member of the managing committee?

107 A. I don't know.

Q. Was he a member at the time you——

A. He was.

Q. And he was also at that time general manager of the Omaha railroad?

A. Yes, sir.

Q. Did you receive any compensation from the Minneapolis Eastern railroad for your services?

A. No salary. If I am—if I incur any expense in connection with the Minneapolis Eastern they pay me for it.

Q. You receive no salary from them and no compensation for your services for the Minneapolis Eastern?

A. No.

Q. Is that true also as to Mr. Trenholm?

A. Yes, sir.

Q. Are any of the officers of the Minneapolis Eastern, including the president, and vice-president, paid by that company for their services?

A. No, sir.

Q. They receive all their compensation from either the Milwaukee or the Omaha road?

A. All the compensation,—yes, that they get.

Q. You hold one share of stock of the Eastern railroad?

A. I have one share in my name.

Q. Do you own it yourself or does it belong to the Milwaukee road?

A. It belongs to the Milwaukee road.

Q. It is simply a qualifying share?

A. Yes.

108 Q. That is true as to the other directors, they hold their shares merely as qualifying shares?

A. Yes.

Q. But the shares themselves belong respectively to either the Milwaukee or Omaha railroads?

A. I presume they do.

Q. Are you acquainted with the respective positions which the early members of the board of directors of the Minneapolis Eastern held either in the Omaha or the Milwaukee? Will you be able to tell me if I read off the names, of the early directors?

A. No, I never have looked into it.

Q. Who is the auditor of the Minneapolis Eastern at the present time?

A. Mr. Jensch.

Q. What connection if any does he hold with either the Milwaukee or the Omaha roads?

A. I think he is the general auditor of the Omaha.

Q. Does he receive any compensation for his services as auditor of the Minneapolis Eastern?

A. No, sir.

Q. His entire compensation is paid by the Omaha?

A. I presume so.

Q. And this same relation which you have described in respect to the different officers of the Minneapolis Eastern has continued during your entire connection with the company?

A. Yes, sir.

Q. Do you know who were the managing directors of the road before you became a member of that committee?

109 A. Mr. Trenholm and Mr. H. B. Earling.

Q. What road was Mr. Earling connected with?

A. With the Milwaukee.

Q. In what capacity?

A. Assistant general superintendent, I relieved Mr. Earling.

Q. Do you know what directors,—what managing directors preceded them?

A. No, sir.

Q. Is it a fact that the managing directors have always been one from the Milwaukee and one from the Omaha roads?

A. I think that is probably true, although I have not looked up the records.

Q. That is your understanding of the fact?

A. Yes.

Q. In paying out money on the Minneapolis Eastern what vouchers,—are vouchers countersigned by anyone else other than the officers of the Minneapolis Eastern? Do they go to the Omaha or the Milwaukee roads?

A. They are countersigned—they are approved by the managing committee of the Minneapolis Eastern.

Q. They are approved by Mr. Trenholm and yourself?

A. Yes.

Q. Beyond that do they go to any other officers of the Milwaukee or the Omaha roads?

A. No, they don't that I know of. I presume likely they
110 are filed in the office of the auditor finally.

Mr. Sheean: As I understand it, the question is whether or not any officer of the Omaha or Milwaukee countersigns these vouchers before they are paid. I understand that to be the question.

Q. I notice in a letter which you wrote to Mr. Houle under date of October 14th, 1912, covering a voucher for repairs to engines, before paying the bill and before signing the voucher, it was sent to the Omaha for signature. Does that refer to Mr. Trenholm as a managing director of the Eastern?

A. Yes, sir.

Q. It goes to no other officer than Mr. Trenholm and yourself?

A. That is all.

Q. Aside from the president of the road, who is Mr. Chamberlain,—by the way, he holds only one share of stock?

A. Yes.

Q. To whom does that belong?

A. The Omaha road.

Q. Aside from Mr. Chamberlain, is there any other member of your board of directors who is not an officer of either the Omaha or the Milwaukee road?

A. Mr. W. H. Norris, attorney for the Minneapolis Eastern.

Q. Where is Mr. Norris' office?

A. He has a desk room in the office of the Milwaukee legal department.

Q. He has been the attorney for the Milwaukee road, has he not?

111 A. He has been, yes.

Q. Aside from Mr. Norris and Mr. Chamberlain, the other members of the board of directors are officers either of the Omaha or the Milwaukee roads?

A. Yes.

Q. And that has been the fact has it not, for a great many years?

A. I think so.

Q. This track you lease from the Great Northern road is .56 of a mile?

A. Yes.

Q. Do you know what rent you pay for that?

A. We pay \$12.50 a month or one hundred and fifty dollars a year for one track. The other trackage is under another agreement which has not yet been executed.

Q. In other words, you have not been using the other track?

A. We are using it.

Q. How long have you been using the tracks of the Great Northern aside from this one track you are leasing?

A. I think about a year and a half.

Q. You have been using all the tracks as indicated in green on your plat for about a year and a half?

A. One track which we pay a rental on we have been using for probably eight or ten years.

Q. You have been paying for that \$12.50 a month?

A. \$12.50 a month.

112 Q. Right along for that track?

A. Yes.

Q. How long has Mr. Houle been connected with the Minneapolis Eastern?

A. I think he told me he has been connected with it for about thirty-four years.

Q. Prior to 1910, he was general yardmaster?

A. Yes.

Q. Did you have any superintendent at that time over him?

A. No, sir.

Q. The title in 1910 was changed to general superintendent?

A. Yes.

Q. Were his duties changed in any way?

A. They were broadened.

Q. He still remained subject to the direction of the managing committee?

A. Yes.

Q. And has charge of the yards and trackage of the Minneapolis Eastern?

A. Yes.

Q. His duties generally would be that of a yardmaster?

A. Yes, and more than that of course.

Q. And he is subject to the direction of the managing committee?

A. Yes, sir.

Q. In all respects?

A. Yes.

Q. How long has Mr. Burdick been connected with the company?

113 A. I could not tell you. He was connected with the company when I came to Minneapolis in 1907.

Q. He also reports to the managing committee and is subject to their direction?

A. Yes, on certain matters. Of course he is an accounting officer.

Q. Under whose supervision are his other duties, as to which he does not report to you?

A. Well, he makes reports to the warehouse commission, the railroad and warehouse commission and the interstate commerce commission and in those matters he is under the supervision you might say of those bodies.

Q. Is there any other official of the Minneapolis Eastern or the Omaha or the Milwaukee road to whom he reports than yourself and Mr. Trenholm?

A. That is all.

Q. In making the various contracts of the Minneapolis Eastern to which you have referred in this exhibit, who represents the Minneapolis Eastern?

A. In making these contracts?

Q. Yes?

A. The managing committee.

Q. As to the collection of revenues, where some commodity comes in over the Milwaukee road and is switched to an industry on the Minneapolis Eastern, the entire revenue is collected by the initial road is it not the line haul charge and switching charge?

A. I believe it is, but I think Mr. Burdick can give better information on that than I could.

114 Q. Who is your purchasing agent?

A. Mr. Houle does that.

Q. What was the name of the legal representative at Washington?

A. Mr. Hume.

Q. Does he represent either the Omaha or the Milwaukee road?

A. Not that I know of. He was appointed to that position through Mr. Norris, our attorney.

Q. The entire management and direction of the Minneapolis Eastern is vested in this managing committee?

A. Yes, sir.

Q. Composed of yourself and Mr. Trenholm?

A. Yes, sir.

Q. Will you describe the movement of a car of grain coming from Granite Falls and destined to the Empire Elevator on the Milwaukee road. Where is the Empire elevator situated?

A. It is located at Washington and 8th Avenue South on the tracks of the Milwaukee road.

Q. On the tracks of the Milwaukee road?

A. Yes.

Q. Describe the movement of a car of grain originating at Granite Falls, destined to the Empire elevator. Granite Falls is on the Milwaukee?

A. Yes. Why a car of grain coming from Granite Falls for the Empire elevator would be set out in our Bass Lake yard, which is located this side of St. Louis Park. The object in setting the car out there is for inspection by the state inspector and after it is inspected, sampled we will say and inspected, the samples are brought here on change. The car is disposed of, carded, we will say, as we term it, for the Empire elevator.

Q. It is sold on the floor of the Chamber of Commerce to the Empire elevator?

A. They give disposition on the car and we card it. The car is then brought to South Minneapolis and from South Minneapolis is sent up town to the Empire elevator.

Q. Now, describe the movement of a car of grain originating at the same point and destined to the Columbia "B" mill and first state where that mill is located, in a general way?

A. The Columbia "B" mill is on the Minneapolis Eastern.

Q. And belongs to what company?

A. The Consolidated, I think.

Q. Now, describe the movement of a car of grain originating at Granite Falls and destined to the Columbia "B" mill?

A. A car moving to the Columbia "B" mill on the Eastern would

take the same movements to South Minneapolis and from South Minneapolis up town, up in our upper yard as we call it. There it would be delivered to the Minneapolis Eastern and the Minneapolis Eastern would make the delivery to the "B" mill.

Q. In what respect in your judgment is there a greater service rendered in delivering that car to the Columbia "B" mill than is rendered in delivering the first car to the Empire elevator?

A. Well, there is a greater service.

116 Q. Describe just wherein you claim there is a greater service?

A. The transfer, as we call them, would bring that car from South Minneapolis to the upper yard, place it on the track or deliver it to the Minneapolis Eastern, and the Minneapolis Eastern would take that car down into what we term the "hole," and if there was room at the Columbia "B" mill, they might spot the car at once. If there was not room, they would put it on one of their hold tracks and set it when there was room.

Q. Is that the only distinction you make in the service?

A. The service of course would be much more expensive on account of the place in which the Minneapolis Eastern has to do the switching. It is on quite a grade, that is, they take it down on this trestle.

Q. It is the fact that it involves a delivery on this trestle that makes the additional expense?

A. Yes, and it is a very congested place. The tracks in connection with the mills.

Q. Are the tracks in connection with the Empire elevator, is there a great deal of room there?

A. Not so very much room, no.

Q. Then what is it that makes so much greater service at the Columbia "B" mill? Is it the fact they have to make a delivery on this expensive trestle referred to?

A. I think there would be probably one more movement in the yard in delivering at the Columbia mill than there would be
117 in delivering at the Empire elevator. That would be something for a practical yard man to figure out, just how he would handle it.

Q. In other words, you think there would be entailed one more switching movement?

A. I think it would be all of that.

Q. And that is due to the fact there is a separate corporation and a separate locomotive to perform the last movement?

A. No, I don't think that. It is largely due to the congested territory.

Q. At the hearing before the commission, is it not a fact that you testified if the Milwaukee road itself was to perform the service there would be just the same number of switches as involved in the movement to the Empire elevator?

A. I don't remember that I did.

Q. Let me see if I have the additional elements of service in the

delivery to the Columbia "B" mill. Is it the fact in your judgment it would entail one more switch?

A. I should say so.

Q. What other elements? This trestle. What other element of extra service? The fact of the trestle?

A. The track on the trestle being limited makes a rather congested condition there at most all times.

Q. So first we have the additional switching movement, second the delivery on the trestle which makes the additional service in the delivery to the Columbia "B" mill over which you have in delivery to the Empire elevator. Is that correct?

A. That is my opinion. I am not a practical switchman, though.

Q. Can you suggest any other additional service you render making your delivery to the Columbia "B"?

A. In what way do you mean?

Q. Any other additional service over and above what you render in a delivery to the Empire elevator? You have had two items, first the additional switch and second the delivery on the trestle?

A. I don't know of anything else. That is giving you my opinion, not as a switchman.

Q. We merely want to get your opinion because you testified on direct examination you in your judgment rendered a greater service and I want to find out wherein you think you render a greater service in your delivery to the Columbia "B" mill?

A. I think I have stated that.

Q. Now, describe the movement of a car of grain originating at the same place and destined to the Christian mill on the Milwaukee road?

A. The movement as far as South Minneapolis would be the same as I have described. From South Minneapolis the car would be taken from there over to the East side where the Christian mill is located.

Q. Do you recall exactly where the Christian mill is located?

A. Yes.

Q. Where is it located?

A. On the East side, the University yard.

119 Q. 19th Avenue Southeast and Bell Street?

A. I don't know the streets but I know the yard.

Q. That entails crossing the Mississippi River?

A. Yes.

Q. Where do you cross the river?

A. On the short line bridge.

Q. Where is that located?

A. In regard to the streets, I could not tell you.

Q. It is up river from Lake Street a little ways?

A. Yes.

Q. Some half a mile?

A. I should say so.

Q. Then it goes over the other side of the river to the Christian mill?

A. Yes.

Q. How long a haul is that compared with the haul to the Empire elevator?

A. Well, it is somewhat longer, I don't know.

Q. It is a very much longer haul, is it not?

A. It must be somewhat longer.

Q. And a very much longer haul than a delivery to the Columbia "B" mill?

A. Yes.

Q. It entails crossing a very expensive bridge, doesn't it?

A. Yes.

Q. A much more expensive bridge than the trestle you have referred to on the tracks of the Minneapolis Eastern?

A. Well, I don't know what is the difference in the cost of the two.

120 Q. There is no question in your mind that the cost of the bridge over the Mississippi river is much greater than the trestle on the Minneapolis Eastern tracks is there?

A. I would not pass any opinion on that. I don't know.

Q. Do you know how long the bridge is across the river?

A. No, I don't know the length of it.

Q. It is very much longer than the trestle is it not?

A. No, I should not say so.

Q. How does it compare in height to the trestle?

A. It is considerably higher.

Q. In making your delivery to the Empire elevator,—or to the Christian mill, your line haul charge would cover the delivery to the mill?

A. Yes, sir.

Q. There would be no additional switching charge?

A. No.

Q. But in making a delivery to the Columbia "B" mill there would be a line haul charge plus a \$1.50 switch?

A. Plus the Minneapolis Eastern charge.

Q. Of one dollar and fifty cents?

A. Yes.

Q. As a matter of fact, the Milwaukee road will deliver any commodity on which it receives a line haul on any industrial track in Minneapolis without any additional charge?

121 A. On their own line.

Q. Any commodity which comes from any point on the Milwaukee road and destined to an industry on the tracks of the Milwaukee anywhere in Minneapolis, the line haul rates will cover the switching to the industry?

A. Yes.

Q. It doesn't make any difference whether one particular industry happens to be located in a more congested district than another, does it?

A. No.

Q. But the line haul rates in each case will cover the switch?

A. Yes, sir.

Q. It doesn't make any difference how much longer haul one industry has than another?

A. No.

Q. If it is on the Milwaukee tracks the line haul rates include the switch?

A. Yes.

Q. It doesn't make any difference how much more expensive switching to one industry is than switching to another if it is on the Milwaukee tracks the line haul rate includes the switch?

A. Yes.

Q. And it is only when you get on the tracks of the Minneapolis Eastern where you claim there is a separate corporation that you claim the right to charge the additional switch. Is that a fact?

A. Yes, sir.

Q. In delivering coal on the tracks,—take a carload of
122 coal originating on the main line of the Milwaukee road and destined to an industry on the Minneapolis Eastern. Would the line haul rate include the switch in that case?

A. On the Minneapolis Eastern?

Q. Yes?

A. No, sir.

Q. Wouldn't the Milwaukee road absorb that switch?

A. I don't know.

Q. You are not familiar with the tariff in that respect?

A. No, sir.

Q. You don't know whether on the delivery of a carload of lumber to an industry on the Minneapolis Eastern, the Milwaukee road would absorb that switch?

A. No, sir.

The Court: What do you mean by "absorb?"

Mr. Morley: There is the line haul rate into Minneapolis plus the switch of the Minneapolis Eastern; and the Milwaukee pays the switch itself and don't charge it to the shipper. The Milwaukee road stands the switch.

(Witness examined by Mr. Smith as follows:)

Q. Mr. Foster, supposing the Milwaukee turns in one hundred cars to the Minneapolis Eastern. It simply credits the Minneapolis Eastern at that time with one hundred and fifty dollars?

A. No, sir, they pay to the Minneapolis \$1.50 if that is the price, if that is what the tariff provides for.

Q. As a matter of fact, is it not, \$1.50 a car?

123 A. Yes.

Q. And in what way is that paid, if you know?

A. It is paid by check, or by money,—mostly checks.

Q. How soon after it becomes due, after the service is rendered, would that be paid on the average, would you say?

A. I don't know about that. Probably within a day or two or three. The Minneapolis Eastern balances their accounts at the end

of the month and unless there is some bills in dispute, they square up.

Q. Are there any deductions made from the money which is received by the Milwaukee road before that money is transmitted to the Minneapolis Eastern?

A. That would be a Milwaukee proposition. I would not know about that.

Q. You don't know whether there are deductions or not prior to transmitting the gross indebtedness to the Minneapolis Eastern?

A. What deductions would you mean?

Q. Anything that is paid out by the Milwaukee road from the gross amount which the Minneapolis is to be paid, before it is paid?

A. No, sir.

Q. Every dollar of the gross income of the Minneapolis Eastern road goes to the Milwaukee and without change or diminution then is transmitted to the Minneapolis Eastern?

A. All the collections made for the Minneapolis Eastern
124 by the Milwaukee or any other railroad is turned over to the Minneapolis Eastern. The Milwaukee and the Omaha business are handled just precisely the same as the business with every other railroad in town.

Q. If there were debts owed by the Minneapolis Eastern to the Milwaukee from time to time that would be deducted from the amount—

A. No, sir. The Milwaukee, if they have any bills against the Minneapolis Eastern, or in other words if the Minneapolis Eastern owes the Milwaukee anything, the Milwaukee will make a bill against the Minneapolis Eastern and the Minneapolis Eastern will pay that amount by check and voucher.

Q. Do you know whether that is the same in transactions between the Omaha and the Minneapolis Eastern?

A. Precisely the same.

Q. And the dividends and everything else that are coming to these two roads you say come separately after an allowance by the auditor, to the Minneapolis Eastern?

A. I don't believe I understand your question.

Q. Anything that is audited,—any bills or claims against the Minneapolis Eastern, is by the auditor, I assume?

A. The bills are all sent to the agent or the managing committee. To the agent as a rule, Mr. Burdick. Mr. Burdick receives these bills and if he has any doubt as to their correctness he will send them
to the managing committee for inspection. Then he makes

125 a voucher, we will say, and sends it to my office where the check is made in accordance with the amount shown on the
• voucher and it passes through the usual channel in that way.

Q. Doesn't it go through the hands of the auditor at all?

A. Eventually, yes.

Q. Later?

A. Yes.

Q. And there is no offsetting of accounts between these two roads and the Minneapolis Eastern?

A. No, sir.

Q. That is the one thing I didn't understand?

A. I think that condition exists, however, as between other roads to a more or less extent, but not with the Minneapolis Eastern.

Q. Who is the one most familiar with the purchasing of supplies and equipment of the Minneapolis Eastern road?

A. Well, I presume I am more familiar with that than anyone. There are certain supplies that are purchased by Mr. Houle. Supplies such as track material, oil waste, engine supplies, but I know all of those transactions, and he makes an order,—I want to explain just how that is handled. He makes a requisition for these supplies and sends the requisition to my office, where it is approved or disapproved and returned to him. Then he goes ahead and purchases his supplies.

Q. Does your approval of the requisition indicate where those are to be purchased?

126 A. No, sir.

Q. Do you know actually where coal for the Minneapolis Eastern was purchased last year, the past-year?

A. I know what firm it was purchased from, the Carnegie Fuel Company.

Q. In this city?

A. They have an office in this city.

Q. Where is the chief office?

A. I presume here, I don't know. All I know about it is they have an office here and the Minneapolis Eastern purchased their coal from the Carnegie Fuel Company.

Q. The Milwaukee road doesn't purchase their coal?

A. No, sir, neither does the Omaha.

Q. Then do you know whether or not they purchased coal from the same company as the Minneapolis Eastern last year?

A. The Milwaukee?

Q. Yes?

A. I would not know about that. I don't know anything about that.

Q. Do you know as to whether there are rails bought in any quantity by the Minneapolis Eastern, last year?

A. Yes.

Q. And were there rails bought by the Milwaukee in any considerable quantity?

A. No, sir, we may have bought a small amount of rails from the Milwaukee early last year—

Mr. Root: That was not the question. Was it bought by the Milwaukee?

127 Witness: No, they don't purchase any of our material at all.

Q. The question was, do you know whether or not the Minneapolis Eastern and the Milwaukee bought rails from the same company last year?

A. No, I know they did not.

Q. But purchases were made from different companies?

A. Let me explain that. The Minneapolis Eastern does not buy any new rail. They buy second hand rail. Second hand usable rail, and we buy them wherever we can get them the cheapest.

Q. They buy a different quality of rail from what the Milwaukee does in that it is used rail?

A. Yes.

Q. Do you know whether any purchases are made directly by the Minneapolis Eastern of either the Milwaukee or the Omaha roads?

A. Yes.

Q. What line of supplies have they bought recently from the Milwaukee road?

A. Well, we have bought some rail, I think early last year from the Milwaukee. We bought some from the Omaha. We got a better price on the rail, and as I say, purchased it wherever we can do the best. We have bought ties from both companies. We have bought ties from the Minnesota Transfer Company. The majority of our ties were furnished last year by the Bell Lumber Company, with offices in Minneapolis.

Q. You refer to that as ties of the Minneapolis Eastern?

128 A. Yes, sir.

Q. And those ties were new ties?

A. Yes. We do not use anything else but new ties.

Q. Does the Milwaukee also buy of the Bell Lumber Company?

A. I don't know.

Q. Is there any other supplies that the Minneapolis Eastern has purchased to your knowledge of either the Milwaukee or the Omaha?

A. Yes, we have bought oil and engine supplies we will say from the Milwaukee. Most of our supplies, however, are bought here locally from Janney-Semple-Hill, I think. I don't know just who Mr. Houle places his order with.

(Witness examined by Mr. Morley as follows:)

Q. Does your map indicate the location of the different industries on the Minneapolis Eastern tracks?

A. The map of this side of the river, yes. On the other side of the river it may not be correct. I think all the industries on this side of the river, the mills and the elevators are shown on that blue print.

Q. Is this the one of this side of the river (indicating Exhibit 2)?

A. Yes, sir.

Q. Where is the Columbia "B" mill located on that?

A. Here (indicating).

Q. It is labeled on the map "Northwestern Consolidated Milling Company." Is there any way to indicate for the record,—it is just west of the ruins of Bassett's sawmill?

A. It is between that and the Occidental mill.

Q. Now, indicate where this trestle commences?

A. That is a long span here about one hundred and fifty feet I think,——

Q. East of the Columbia "B" mill?

A. Wait now, yes. The trestle would start probably about one hundred and fifty feet east of the Columbia "B" mill and extend to the extreme end.

Q. In an easterly direction?

The Court: By easterly do you mean along the river bank?

A. Down the river.

The Court: That would be south?

A. Yes, along the river bank.

Q. In other words, delivery to the Columbia "B" mill would not involve the use of this trestle, would it?

A. No, it would not.

Q. And the same would be true as to a delivery to the Occidental Milling Company?

A. Yes, sir, although it is a very congested district just the same.

Redirect examination.

Examined by Mr. Sheean:

Q. Your supplies I assume are purchased by your general purchasing agent located in Chicago and you have no personal knowledge as to where the same are purchased?

130 A. That is correct. For the Milwaukee road you mean?

Q. Yes?

A. Yes.

Q. Now the Minneapolis Eastern Railway Company imposes a charge of \$1.50 on every car it switches out or switches in to the industries on its tracks, doesn't it?

A. No, that is not quite right. All cars switched in but cars switched out are on a tonnage basis.

Q. That is right, but it imposes a charge?

A. Yes.

Q. And that charge is imposed irrespective of whether the car comes from the Omaha or the Milwaukee or any of the other nine railroads doing business in Minneapolis?

A. Yes, sir.

Q. The same charge is made on every car going out to any one of the nine railroads in Minneapolis?

A. The same charge.

Q. As a matter of fact, then, the business of the Minneapolis Eastern is conducted on the same basis in respect to all roads in making charges and collecting charges?

A. Yes, sir.

Q. In other words, if the Great Northern road delivers a car to the Minneapolis Eastern upon which a charge is imposed, the Minneapolis Eastern collects the total freight?

A. No.

Q. I should say the Great Northern collects the entire charge?

131 A. Yes, sir.

Q. And the Minneapolis Eastern bills on it for the car, or the service which it rendered?

A. Yes, sir.

Q. As a matter of fact, is not that the practice of all the roads, to include the collection of the switching charge in the charge made for the line haul?

A. Yes, sir.

Q. In other words, no switching road imposes or makes its own collections direct upon that class of traffic?

A. Just what do you mean by that?

Q. I mean no road, all roads performing a line haul upon which a switching service has to be done by another company, collects the entire charge?

A. Yes, sir.

Q. And afterwards remits to the switching company either on bills from it or direct?

A. Yes, sir.

Q. Therefore it makes no difference over what line or road the freight moves, the charges are imposed in the same manner and collected in the same manner as the Eastern?

A. Precisely the same.

Q. The Eastern Railway Company imposes this charge as I understand it, of \$1.50 on inbound cars and a certain tonnage collection on outbound cars?

A. Yes, sir.

Q. That charge is not imposed by any one of the nine railroads connected with or hauling freight into Minneapolis?

132 A. That charge is not imposed—

Q. That charge is not imposed by the railroads,—it is not carried,—it is a charge that the Minneapolis Eastern by its tariff imposes by itself?

A. Yes, sir.

Q. Some confusion may arise about this question of accounting. Does the Minneapolis Eastern keep its own books?

A. Yes, sir.

Q. On its own forms?

A. Yes, sir.

Q. And collects its own money?

A. Yes, sir.

Q. And disburses direct its own money?

A. It does.

Q. It deals with all railroads in the same way in the collection of its money and in the disbursements of its money?

A. The same.

Q. At the end of the year it has an annual statement or a balance account I assume like any other railroad?

A. Yes, sir.

Q. And if its directors see fit, they declare dividends?

A. Yes, sir.

Q. And those are paid its stockholders?

A. Yes.

133 Q. In other words, the dividends are not mixed up in any controversy that may exist between the stockholders of the railroad—that is not very clear—there is no confusion of accounts or claims between the payment of dividends and any claim the Omaha may have against the Minneapolis Eastern for some other account?

A. No, sir.

Q. Have you here a list of the blanks and forms that the Minneapolis Eastern uses in the operation of its railroad?

A. Yes, sir.

Q. Will you produce them?

A. Yes, sir. I have a sample of each of these blanks.

Mr. Sheean: We will have these marked as one exhibit, defendants' Exhibit No. 4.

Q. Are those the customary and usual records kept by railroad companies in operating their railroads?

A. So far as I know they are along the same lines.

Q. Respecting the absorption of switching charges. Railroads in Minneapolis absorb under certain conditions switching charges of all switching roads, do they not?

A. I think they do, but I am not positive about that. I would rather not make a positive statement on that.

Q. The Milwaukee company absorbs switching charges under certain conditions where the services are performed by other railroads than the Eastern Railway Company?

A. Where the switching service is performed, under certain conditions, yes.

134 Q. You are not a traffic man, but generally speaking, if the line haul revenue amounts to more than fifteen dollars, they absorb the charge?

A. That is as I understand it.

Q. So absorbing the switching charge imposed by the Minneapolis Eastern is not peculiar to that railway company?

A. No, sir.

Q. Now, the Minneapolis Eastern makes the same charges to all railroads, doesn't it?

A. The same charge to all railroads.

Q. For like service?

A. Yes, sir.

Q. This bridge that Counsel has called your attention to over the Mississippi River. That is a bridge which is part of the main line of the Milwaukee road, is it not?

A. Yes, sir.

Q. And all your trains, freight, passenger and otherwise, move over that bridge?

A. Going in that direction, yes, sir.

Q. And that bridge is also used by the Soo trains and the Rock Island trains, is it not?

A. Yes.

Q. So that the bridge itself is devoted to a very extensive service and not limited to the mere switching of cars?

A. Yes, sir.

Q. Comparison has been made of the cost between the deliveries designated upon the Milwaukee from a designated point, to the Empire elevator located on the Milwaukee and to Columbia "B" on the Minneapolis Eastern. How much greater distance,—
135 what is the distance I will ask that a car is hauled in going to the Columbia "B" mill greater than if destined to the Empire elevator on the Milwaukee referred to by Counsel?

A. You mean from South Minneapolis, taking that as a starting point on the switch movement?

Q. Yes?

A. Well, I think the Empire elevator from the main switching yard at South Minneapolis is about two miles and the distance from there to the Consolidated mill, the way we have to do the switching, may be half a mile further.

Q. Is the Consolidated mill on the East side of the river?

A. On the west side of the river.

Q. Now, you spoke about cars going what you would call "down in the hole" on the Minneapolis Eastern. What did you mean by that? Describe that condition?

A. Well, I don't know that would apply exactly in moving a car from the Empire elevator to the Consolidated mill because it is down hill from the Empire elevator to the track, which is on the level, which reaches the Consolidated mill.

Q. Generally speaking, however, it is that condition on the Minneapolis Eastern road that increases the cost of operation?

A. Yes, it certainly would.

Q. And on the movements of the Minneapolis Eastern, another engine is required and an extra crew of men, are they not?

136 A. Yes.

Q. Than the movement Counsel describes.

Mr. Root: There is one question occurs to me that I think I can ask. In the one case of the switch to the industry or elevator on the Milwaukee road, the Milwaukee road simply uses its regular switch engine and its usual and general track and service and in the,—without any additional expense; in the other case where a switch is to an industry or mill on the Minneapolis Eastern, there is involved that plant down there which cost, with the bridge and other facilities, hundreds of thousands of dollars. Is not that true?

A. Yes.

Q. Are those not elements you would take into consideration in carrying the cost, the interest on the investment and the additional cost of the plant in the one case that was necessary to furnish that service?

A. It would not make any difference to us whether the Milwaukee or the Omaha or any other railroad operated the Minneapolis Eastern. They would have to have practically the same service the Minneapolis Eastern now has. At this season of the year and from now on it would be in service two switch engines—

Q. If the Great Northern owned the plant of the Minneapolis Eastern or private individuals, it cost just that much more to set a car down there because of that enormous investment and this extra service than it does to an industry on the line road, don't, in every case?

137 A. The additional service is there just the same.

Q. And the additional cost of service because of the investment?

A. If you have the additional service it must necessarily mean additional cost.

(Mr. Sheean resumes examination of witness:)

Q. Judge Norris as I understand it is one of the officers of the Minneapolis Eastern Railroad, General Counsel?

A. Yes.

Q. He receives a salary for his services?

A. Yes, sir.

Q. Is he in the employ of the Milwaukee company?

A. No, sir.

Q. Is any compensation paid to anybody for doing the clerical work that falls to the managing directors?

A. My chief clerk is on the payroll of the Minneapolis Eastern for twenty-five dollars a month.

(At this time a short recess was taken.)

Q. Mr. Foster, a personal injury case arising on the Minneapolis Eastern is investigated by whom?

A. By Mr. Houle, the superintendent.

Q. Who adjusts or disposes of those cases?

A. Mr. Norris and myself with Mr. Houle.

Q. Have either of the companies, the Omaha or the Milwaukee anything to do with the adjustment of these claims?

138 A. No, sir.

Q. Is that same thing true of your loss and damage claims arising on the Minneapolis Eastern?

A. Yes, sir.

Q. One question I want to ask you; have you ever as a Milwaukee official attempted to control or operate this railway in the interests of either the Omaha company or the Milwaukee company?

A. No, sir.

Q. Some question was asked you about your compensation. As I understand it you receive no compensation for the services which you render to the Minneapolis Eastern Railway Company?

A. No, sir.

Q. Your chief clerk, however, does receive compensation for doing certain parts of that work?

A. Yes, sir.

Q. Have you ever received any increase in salary or increased compensation from the Milwaukee company for the services such as they are which you render the Eastern?

A. No, sir.

Q. So far as you know is that true of the other officers of the Minneapolis Eastern Railway Company who are also employees or officers of other companies?

A. So far as I know.

Q. Now, Mr. Foster, what is the usual arrangement which the Milwaukee company makes for the construction and maintenance of industry tracks?

A. Why the usual practice is when an industry makes an application for trackage, we require the industry to furnish the right of way, the grade and pay for the labor and ties in connection with laying the track and the railway company furnishes the metal. That as to cost, divides it on about a fifty per cent basis.

Q. That treatment is general is it, with the public who desire locations on industry tracks adjacent to the Milwaukee road?

A. Yes, sir.

Q. So far as you know, is that not the general practice with most railroads operating in this territory?

A. I think generally so. In fact, the interstate commerce commission has required them to treat all alike, or substantially all alike in such matters.

(Witness examined by Mr. Morley as follows:)

Q. What distance did you say the Empire elevator was from your south yards?

A. I think about 1.08 miles, if I remember right.

Q. Can you estimate approximately the distance from your south yard to the Christian mill?

A. I should not think there was very much difference in the distance.

Q. Going across the river?

A. Yes.

Q. And then down to the Christian mill?

A. There may be a little more distance that way although I would not think there was very much more.

140 Q. What roads did you say used the bridge across the river?

A. The Milwaukee, the Soo, the Rock Island.

Q. Do all those roads use that bridge for both freight and passenger trains?

A. No, the Soo use it for passenger only.

Q. Do you know approximately how many cars go over that bridge every day?

A. I could not say here, but a large number.

Q. How would it compare with the number of cars handled on the Minneapolis Eastern tracks?

A. Well, there is more cars go over the short line bridge in one day than there is in the Minneapolis Eastern in a week.

Q. Where is the track of the Milwaukee road, the branch from this main line over to St. Paul and the Christian mill?

A. Just the other side of the bridge, just east of the bridge.

Q. And what is the character of the track, of that branch track?

A. It is for switching service.

Q. Approximately how long is it?

A. I would not dare guess at that, I don't know. It runs to a connection with the Great Northern.

Q. It is used almost exclusively for switching?

A. Yes, transfers to other lines and switching.

Q. Who paid for the tracks into the Empire elevator, do you know?

A. No.

Q. You don't know whether the industry paid it or not?

141 A. No, those tracks were put in a good many years ago.

Q. And as to the Christian mill?

A. I could not tell you.

(Witness examined by Mr. Root as follows:)

Q. The East side spur that runs from the east end of the short line bridge that you use for the purpose of delivering cars to what industry was it?

A. The Christian mill.

Q. That east side spur leads out of the short line double track near the east end of the short line bridge and goes up in a general north-westerly direction across Washington Avenue and University Avenue and it is practically the only means that the Milwaukee company has of making transfer to and with what roads?

A. The Great Northern, the Northern Pacific and Soo and the C. B. & Q.

Q. That is what it was constructed for?

A. And the Chicago Great Western.

Q. And it happens this Christian mill is located on one of these tracks and receives service?

A. Yes, sir.

Q. How much service at the Christian mill, for instance, much or little?

A. Well, they get probably one or two switches a day. I would not say just how many, whenever it is necessary.

Q. But the Minneapolis Eastern is not used for making transfers between the Milwaukee road and other roads, it is only used
142 for making exchanges or transfers between the Milwaukee road, so far as the Milwaukee road is concerned and the mills and industries on the Minneapolis Eastern track?

A. Yes.

Q. That is right, is it?

A. They do some interchange through there, but not very much.

Q. Very little?

A. Very little, yes.

Q. I do want to refer to one other matter and make it perfectly plain to the Court. Assuming the Court don't know as much about these matters as you do, you spoke about locating an industry on the Milwaukee tracks and under what conditions and division of expense such a location was made. Now, in the one case you say fifty per cent of building a small short track to serve a client and in the

other case of serving that industry by switching is contrasted with a million dollars spent for a plant that the Minneapolis Eastern has to construct and maintain to serve the industries down there. Wouldn't you take the expense and interest on this investment into consideration and contrast that and compare that in estimating the cost of service in such a case?

A. It should be.

(Examination of witness by Mr. Morley:)

Q. What road does the Milwaukee interchange with through the Minneapolis Eastern?

A. The Omaha and at times the Eastern is used as an intermediate switching line between the Northern Pacific, the Soo line and the Milwaukee on perishable business, something that requires quick movement. That, however, is limited.

Q. Do any other roads interchange through the Minneapolis Eastern? I don't mean with the Milwaukee, but with each other?

A. No.

Q. It is not used for the interchange of any other roads than—

A. Except as I have stated. The Milwaukee and the Omaha and other business going to, for instance, the Soo and the Northern Pacific or the Great Northern, fruit, perishable freight that requires quick movement.

Mr. Root: That don't average a car a day does it?

A. I would not say that. It might average more than that.

Mr. Root: A charge is made for that service?

A. Oh, yes.

Q. The Minneapolis Eastern receives a great many cars from connecting lines other than the Milwaukee or the Omaha destined to mills on its tracks?

A. Yes.

Q. A very large number?

A. Yes.

Q. Daily?

A. Daily.

Q. And receives remuneration for all this switching service?

A. Yes, sir.

144 Q. Can you describe the grades on the line leading from your short line connection over to the Christian mill?

A. Going to the Christian mill the grade is level or a little down, about level from South Minneapolis to the bridge, to the short line bridge, and from there to the Christian mill it is slightly down grade.

A. W. TRENHOLM, being first duly sworn on behalf of the defendants, testified:

Examined by Mr. Sheean:

Q. Where do you reside?

A. St. Paul.

Q. What official position do you occupy with the Minneapolis Eastern?

A. A director in the company and one of the managing directors.

Q. How long have you been a managing director of that company?

A. I think since about 1903.

Q. You and Mr. Foster since 1907 have been the managing directors?

A. Yes, sir.

Q. As such state in a general way what you and he have done toward managing and operating the Minneapolis Eastern?

A. Well, we have operated it, controlled it, Mr. Foster, however, has done most of the work, being located in Minneapolis. What work there was to do outside of any questions that would
145 come up in regard to contracts or a change of policy or any thing he thought of sufficient importance, he would confer with me on it.

Q. The contracts are executed by what officers of the company?

A. Well, usually by either the managing directors or by the president and the secretary.

Q. Depending upon the character of the contracts?

A. Depending upon the character of the contracts.

Q. What position do you occupy and have you occupied with the Omaha company during these years?

A. General manager.

Q. Did you receive any compensation from the Omaha company for the service which you rendered to the Minneapolis Eastern as a director?

A. I do not.

Q. You receive no compensation from the Minneapolis Eastern Company for this service?

A. Not from the Minneapolis Eastern, no, sir.

Q. Now, has any officer, director or stockholder of the Omaha company ever attempted to direct or control through you the management and operation of the Minneapolis Eastern by its managing directors or officers?

A. They have not.

Q. Referring now particularly to the actual operations, have the directors of the Minneapolis Eastern Railway Company ever tried to control or specify how that railway company should be operated by its managing directors?

146 A. They have not.

Q. Have you as an officer of the Omaha company ever attempted to control or direct the operation of the Minneapolis Eastern Railway Company in the interests of the Omaha company?

A. I have not.

Q. Or in any other way?

A. Or in any other way.

Q. What difference would you say existed between the character of the Minneapolis Eastern Railway Company property and other industry tracks owned and operated—industry tracks operated by the Omaha company?

A. Well, very expensive trackage would be the principal difference I should think.

Q. You have heard Mr. Foster's testimony in respect to the conditions under which the Omaha company is induced to build industry trackage, have you not?

A. The Milwaukee company you mean?

Q. Yes. What is the fact as to that being, generally speaking, the practice of the Omaha company?

A. That has been our practice for a great many years.

Q. What, specifically stating it, what is your practice with reference to the construction and operation of industry tracks?

A. We adopted a policy of building industry tracks to conform with what we figured was the law of discrimination in line with that which was that the party wanting the track should furnish
147 the right of way, do the grading, furnish the ties, pay for the labor of surfacing and the railroad would furnish the metal, switch material and maintain the track. That is an executed contract in all cases and a deposit is placed,—we require a deposit placed before we do any work covering that part of the work after the right of way has been furnished and that is uniform with us in all cases.

Q. What benefits if any accrued to the Omaha company by reason of its interest in the Minneapolis Eastern Railway Company as a stockholder?

A. It gets the return on its stock and bonds and to that extent I should say only would they benefit.

Q. Does it enable the Omaha to control any traffic or get any advantage over any other railroad company in this territory?

A. None at all.

Q. What do you say as to the necessity of the Minneapolis Eastern Railway as a terminal facility of the Omaha company? In other words is it necessary for the Omaha company as a terminal facility of its railroad?

A. I would not consider it necessary at all.

Q. The service rendered to the industries on that track is substantially industrial service, is it?

A. Yes, sir.

Q. State whether or not the Minneapolis Eastern makes its own contracts?

A. Yes, sir.

Q. Does it own its own property?

A. Yes, sir.

148 Q. Who pays its operation,—its operating expenses?

A. The Minneapolis Eastern pays its own.

Q. And who collects its revenues?

A. Their agent collects their revenues.

Q. Does that company keep its own accounts?

A. Yes, sir.

Q. And maintains a corporate existence?

A. Yes, sir.

Cross-examination.

Examined by Mr. Morley:

Q. When did you become connected with the Omaha road?

A. In 1879.

Q. It was during that year that the Minneapolis Eastern commenced operation, was it not?

A. Well, all I know about that is the records I have seen, I thought it was 1878.

Q. It was incorporated in 1878, but commenced operation late in 1879 as I recall it?

A. Well, I think that is right.

Q. Your first report in 1883 of the Minneapolis Eastern shows the following directors: J. S. Pillsbury,—will you indicate as I read the names who were connected with either the Milwaukee or the Omaha and their respective positions?

A. I will if I can. Mr. Pillsbury was a neutral.

Q. C. H. Prior?

A. I think he was with the Milwaukee as I recall.

Q. J. A. Monroe?

A. I think that at that time he was with the Omaha.

149 Q. And in what capacity?

A. I think as traffic manager.

Q. W. H. Truesdale?

A. He was an Omaha man. He was afterwards the general freight agent in St. Paul. He was originally of the St. Louis.

Q. E. W. Winter?

A. The Omaha.

Q. In what capacity?

A. Superintendent, general superintendent and general manager.

Q. J. H. Hyland?

A. He was an Omaha man, but afterwards went with the Milwaukee. He was the general freight agent with us.

Q. What position with the Milwaukee?

A. He went with them as a traffic man, but I would not attempt to give his title.

Q. J. A. Chandler?

A. General western agent of the Milwaukee.

Q. P. M. Meyers?

A. I didn't know him.

Q. S. S. Merrill?

A. Milwaukee. He was later president of the Milwaukee, but at that time I don't recall his title. I think general manager or vice-president.

Q. H. A. Gray? He is named as auditor in this report?

A. He was the Omaha auditor at that time.

Q. In going over the subsequent reports, I will only indicate the new names as they appear on the board and will not repeat the names of old directors who were re-elected. In 1884
150 the following new directors were elected: J. M. Whitman?

A. General superintendent of the Omaha.

- Q. J. T. Clark?
A. He was an Omaha man.
Q. In 1885, J. D. Howe?
A. General Counsel for the Omaha.
Q. R. Miller?
A. President of the Milwaukee.
Q. In 1886, L. A. Robinson succeeds Mr. Gray?
A. An Omaha auditor.
Q. 1887, C. W. Case?
A. A Milwaukee man, I think he was general superintendent.
Q. 1888, F. B. Clark?
A. Freight traffic manager for the Omaha.
Q. In 1889, W. G. Collins?
A. He was a Milwaukee man and I think a general superintendent.
Q. W. H. Norris?
A. I don't know what his title was then.
Q. He at that time was counsel for the Milwaukee?
A. I think so.
Q. W. A. Scott?
A. Omaha, general superintendent.
Q. In 1891, H. R. Williams?
A. A Milwaukee man.
Q. In 1899, Thomas Wilson?
A. Omaha general counsel.
Q. In 1898, W. J. Underwood?
A. A Milwaukee man.
151 Q. Do you know his capacity?
A. General superintendent I think.
Q. In 1900, A. J. Earling?
A. A Milwaukee —, general superintendent I think.
Q. E. E. Woodman?
A. Secretary for the Omaha.
Q. C. A. Cosgrove?
A. A Milwaukee man.
Q. Do you know his position?
A. No, I don't recall it.
Q. L. K. Luse?
A. He was attorney for the Omaha.
Q. In 1902, E. D. Sewall?
A. A Milwaukee man, general superintendent here.
Q. F. A. Chamberlain?
A. A Minneapolis man, he is the present president.
Q. In 1903, Marvin Hughitt?
A. President of the Omaha.
Q. And your name appears at that time as on the board. You were the general manager?
A. Yes, on the Omaha.
Q. In 1906, H. B. Earling?
A. He followed Mr. Sewall as general superintendent on the Milwaukee I think.

- Q. In 1908, J. H. Foster and T. A. Polleys?
A. He, Polleys, is the secretary of the Omaha.
Q. He is the secretary at the present time?
A. Yes, sir.
- Q. In 1911, W. A. Gardner?
152 A. He is our Omaha president.
Q. In 1912, Charles Jenssch appears as auditor.
A. He is the general auditor of the Omaha.
Q. At the time that,—during what year did you become a member of the managing committee?
A. I think 1903.
Q. Who was the other member of the committee at that time?
A. My recollection now is Mr. Earling.
Q. And he was what on the Milwaukee road?
A. Either assistant or general superintendent for the Milwaukee road.
Q. And who did he succeed as a member of that managing committee?
A. I think Mr. Sewall.
Q. And who did you succeed?
A. Mr. Scott.
Q. What was his position?
A. General manager of the Omaha.
Q. Do you know who preceded him on the committee?
A. No, I do not, it was probably Mr. Whitman.
Q. Was he the president or general manager of the Omaha?
A. Superintendent.
Q. The fact is that at all times the managing committee has been one from the Omaha and one from the Milwaukee?
A. So far as I recall. As long as I have been connected with it that has been true.
- Q. Now, referring to the expensive trackage of the Minneapolis Eastern. Is it not a fact that the line haul rate of the Omaha road includes a switch to any industry on its tracks in the city of Minneapolis?
153 A. Yes.
Q. No matter whether delivery to one industry is much more expensive than delivery to another?
A. Any industry located on the exclusive trackage of the Omaha road we make one free delivery.
Q. It makes no difference whether the distance to one industry is greater than the distance to another, the line haul rate nevertheless includes a delivery to that industry?
A. To our industries—we are so situated—our industries are not very much greater in distance, it would make no difference.
Q. If it is on the Omaha road, the line haul rate would include one switch to an industry no matter whether the distance was greater to one than to the other and the expense of making the delivery greater?
A. We make one delivery whether it be on a delivery track or to an industry on our own tracks.

Q. That is true only at Minneapolis?

A. Anywhere on the Omaha road.

Q. That is a general custom is it not of all roads?

A. I think so, generally speaking it is.

Q. No distinction is made as to the cost of the service if the industry is on the tracks of the road having the line haul, that line haul rate includes a switch to that industry?

A. I believe that is true.

154 (Mr. Sheean examines the witness as follows:)

Q. Do you know of any industry track in this state or elsewhere costing the amount of money to construct and operate as the line of the Minneapolis Eastern Railway Company?

A. I know of none, no.

Q. Did the Chicago, St. Paul & Minneapolis Railway Company have any rail in Minneapolis in 1878?

A. Not to my knowledge, they did not.

Q. Did it at that time have any running rights or trackage rights from St. Paul to Minneapolis?

A. My recollection is they did not.

(Mr. Morley examines the witness as follows:)

Q. When did it acquire running rights into Minneapolis?

A. My recollection is they acquired running rights over the Great Northern in 1880.

Q. That would be immediately following the completion of the Minneapolis Eastern, wouldn't it?

A. Yes, if it was completed in 1879. I don't know when the Minneapolis Eastern was completed.

Q. If the Minneapolis Eastern tracks were part of the Omaha road today, would you make delivery on industries on the Eastern tracks without additional switching charge?

A. Yes, sir.

The Court: Let me ask one question, or suggest a question.

155 Maybe you are going to bring it out anyway. I should like to know about how many industries are served by the Minneapolis Eastern?

Mr. Morley: The map shows that and the findings of the commission show it also.

Mr. Smith: The third page, fifth paragraph.

E. T. ABBOTT, being first duly sworn, testified as follows:

Examined by Mr. Root:

Q. You are a civil engineer with residence at the city of Minneapolis?

A. Yes, sir.

Q. And been engaged in that profession for about how many years?

A. Since 1871.

Q. You have been present and heard some testimony in this matter so you know what it is about?

A. Yes, sir.

Q. About how long a time or at what early date did you become familiar with the Minneapolis Eastern and conditions down on the river?

A. From the time it was born, in 1878 I think. I cannot swear to that exact year, but that is my recollection because I was at that time in charge of surveys for the city of Minneapolis in the City Engineer's office and my recollection is it was 1878.

Q. You testified at the hearing before the commissioners in this matter?

A. Yes, sir.

Q. My recollection was that you testified there. Let me call your attention.—I didn't ask the question just as asked, but were
156 you asked a question there about how long you had known this switching situation in Minneapolis in this territory and I think you said since 1872.

A. That didn't refer particularly to this case, but I had been familiar with it from 1872.

Q. Did you not at the time that this Minneapolis Eastern corporation was organized, know that there was such an enterprise that was going on, that was being organized?

A. Yes, sir, I did.

Q. And that was being organized, as I think you testified in the hearing in this matter, by the millers?

A. That was my recollection of it. As to having any absolute knowledge, except I think I knew at the time that either Mr. Bassett or some of the millers was the president of the proposition, but as I remember it, it was originally a miller proposition. I could not swear to that positively.

Q. There is an instrument in evidence in this case, or a contract or agreement between the Omaha company and the Milwaukee company and the Minneapolis Eastern with reference to certain stock and the purchase of stock of the Minneapolis Eastern which refers to maps and plans on file of this proposed enterprise, the Minneapolis Eastern and with reference to awards or reports filed by the commissioner in condemnation proceedings, that agreement being dated October 25, 1878, and also the minutes of a meeting of the Minneapolis Eastern on that date referring to the awards or reports of
157 commissioners already filed and referring to plans and maps theretofore made or filed. What is your recollection with reference to the time when work was begun on the Minneapolis Eastern? Actual physical work, with reference to that time?

A. I could not swear to that time, but I know work was commenced there and I was, I think, a witness before that commission on that award.

Q. Is it your recollection work was actually begun during that summer of 1878?

A. Work was begun either in 1878 or 1879. I know it was com-

menced just about the time when these proceedings were pending or going on.

Q. And those proceedings according to this instrument, or evidence which was introduced by the state in this case, shows the condemnation proceedings were going on during the summer of 1878. With that to refresh your recollection, it is your recollection that while these proceedings were going on, they were going on with the work?

A. That is true. They were having,—the only real contest they had on the condemnation was getting through the mill company's property and a bridge across the canal. A man by the name of Douglas was at the head of the Minneapolis Mill Company and I remember the time, they would not let them go where they wanted to go, the way they first had it, and had to change their line, but afterwards they got their connection with the Great Northern at Third Avenue North and River Street. My recollection is that construction was going on at that time. I know they moved the old abutments where the Minneapolis & St. Louis tracks went
158 under the end of the old suspension bridge and that abutment was being moved and I was looking after that on the part of the city to see exactly what they were going to do in regard to it. I could not swear as to the year.

Cross-examination.

Examined by Mr. Morley:

Q. Your recollection is rather indistinct in these matters is it not?

A. As to all the incidents, it is absolutely distinct, but as to the exact dates I could not swear to.

Q. You would not swear that work was commenced in 1878 or 1879?

A. No, I would not because I don't know to a certainty. It was just about coincident with these proceedings.

Q. Does your recollection furnish you with any information as to whether the Milwaukee and the Omaha roads were paying for that work?

A. I don't know.

Q. You don't know that the millers ever put any money into that railroad?

A. I do not.

Q. Your only way of connecting the millers up with it was your recollection that Mr. Bassett was president?

A. That is about the size of it as I remember it. Mr. Bassett was connected with it and I didn't have anything to do with the management of the company. I did with the engineer doing the work.

159 Q. Were the engineers connected with the Milwaukee or the Omaha roads?

A. No, sir, none of them in any way.

Q. Do you know from whom they received their compensation?

A. I do not.

Q. Do you remember the names of the engineers?

A. You are right I do, a man by the name of Seldon was the chief engineer and Mr. Gow was the locating engineer and made all the maps on which condemnation was made.

Q. Is Mr. Seldon living now?

A. He ought not to be because he was a man of sixty years old then and that was 1878 or 1879.

Q. And the other man?

A. I have never seen him since. He was a middle aged man at that time.

(Mr. Root examines the witness as follows:)

Q. Neither of those were employed by the Omaha or the Milwaukee?

A. Not to my knowledge. They were certainly not on the staff of either company at that time.

Mr. Morley: Whether they were receiving compensation from those roads, you don't know?

A. I do not.

Q. They were as you understood representing the Minneapolis Eastern?

A. There was no question but what they were representing the Minneapolis Eastern.

Q. And you were then acting in an official capacity for the city of Minneapolis?

160 A. Yes, under detail as to what they were doing or going to do down there in the crossing of Hennepin Avenue.

PETER HOULE, being first duly sworn, testified as follows:

Examined by Mr. Shecan:

Q. Where do you reside?

A. Minneapolis.

Q. And what is your official position with the Minneapolis Eastern Railway?

A. Superintendent.

Q. How long have you been connected with that company?

A. Since 1881.

Q. How long have you been superintendent?

A. Since 1909.

Q. As superintendent, what are your duties, generally expressed?

A. Why, to look after the managing, the switching, the repairs and the construction of the road when it requires anything to be done,—in other words, general supervision of it.

Q. Are you in direct charge of the operation of that road?

A. I am.

Q. Who is your superior officer on the road?

A. Well, anything I have any doubt about myself, I refer to Mr. Foster.

Q. One of the managing directors?

A. Yes.

Q. Who is the president of the company?

161 A. Mr. F. A. Chamberlain.

Q. Prior to your becoming superintendent, who was your immediate superior?

A. Well, at that time I was general superintendent, the business was such it didn't require a superintendent,—general yardmaster I mean, and at that time I would defer to Mr. Foster during the time he was there.

Q. Has there been any change in your duties between the time you were general yardmaster and the time you were general superintendent?

A. Well, I got a little bit more authority.

Q. What have you to do in the respect to the purchase of supplies?

A. I purchase all reasonable supplies and when we come to order rails, ties, and so on then I consult Mr. Foster before I buy it.

Q. Who employs the men who work on the Minneapolis Eastern?

A. I do.

Q. Who discharges them?

A. I do.

Q. Who issues the rules and controls the method and nature of doing the business?

A. I do.

Q. Who keeps the payroll of the men there working?

A. Well, the agent makes it and I approve it.

Q. Who pays the operating expenses of the Minneapolis Eastern?

A. We do. I O. K. all bills.

Q. During your thirty-four years' employment there for the
162 Minneapolis Eastern, has any Omaha officer or stockholder ever directed or controlled the operation of the road that you had in your charge?

A. Never.

Q. Has any officer, stockholder, or director of the Milwaukee Company directed or controlled your actions as superintendent or general yardmaster?

A. That is the Milwaukee or the Minneapolis Eastern?

Q. The Milwaukee representatives?

A. Only the position the general superintendent holds now. That is the only man I take orders from.

Q. Has Mr. Foster as superintendent of the Milwaukee Company ever directed or controlled your operation of the Minneapolis Eastern Company?

Mr. Morley: Objected to as calling for the conclusion of the witness, whether he does it as an officer of the Milwaukee or the Eastern.

Q. I will limit the question "so far as you know?"

Mr. Morley: I renew the objection.

The Court: I think I will overrule the objection to the question as amended.

Q. So far as you know, has any officer, director or stockholder of the Chicago, Milwaukee & St. Paul Railroad Company directed or controlled your operation of the Minneapolis Eastern Railway?

A. No, sir.

163 Q. Do you know either the Omaha or the Milwaukee Company as operators,—as operating that railroad in any form?

A. As Milwaukee or Omaha officers, no, sir.

Q. Do you know who was the first president of the Minneapolis Eastern road? Or was that before your time?

A. That was before my time.

Q. Do you know who was the president preceding Mr. Chamberlain?

A. Only by record.

Q. Now, I will ask you do either the Omaha company or the St. Paul company derive any advantage by reason of their being stockholders of the Minneapolis Eastern over any other railroad coming into Minneapolis?

A. No, sir.

Q. They get their dividends on their stock, but outside of that do either of those roads derive any traffic or control any traffic through you or by reason of their ownership of the stock?

A. No, sir.

Q. How are the railroads treated in respect to service?

A. By the customer's request. They say what they want and we get it for them if we can. If not, then we ask them to substitute some other cars. We get them what they want.

Q. Are they treated alike and without discrimination?

A. Without discrimination.

164 Q. Are any movements made on the Minneapolis Eastern from one industry located thereon to another industry located thereon?

A. Sometimes.

Q. To what extent is there interchange there of cars between the different railroads?

A. You mean the total amount of cars per day?

Q. About how many a day, few or many?

A. Well, depends upon how business is. Take it now, there is many. When business is light, the flour mills govern us really.

Q. The Minneapolis Eastern imposes a charge upon that movement, doesn't it?

A. Yes, for all loaded cars, nothing for empties.

Q. No railroad charges for the movement of empty cars under similar conditions?

A. Well, under similar conditions,—I understand if they order a car and don't load it somebody pays for it.

Q. Well, that is under the demurrage law. If you order a car and hold it, whether you are a railroad or an industry, you have to pay demurrage charges?

A. Some railroads have a tariff that if you handle an empty car and don't load it, they pay for it.

Q. In that connection, does the Minneapolis Eastern collect demurrage charges?

A. Yes, sir.

Q. How is it treated with reference to holding cars an unnecessary length of time? Is it assessed therefor on a per diem basis?

A. We pay a per diem.

Q. To the railroads?

165 A. Yes.

Cross-examination.

Examined by Mr. Morley:

Q. You issue the rules and regulations and employ the men and discharge them and run the railroad under the direction of the managing committee, do you not?

A. As far as the rules and regulations, and as to employing the men, I don't consult the managing directors about that, I use my own judgment. I have been a railroad man for forty years.

Q. Any directions they give, you observe them?

A. Yes.

Q. You are under their supervision?

A. They are my superiors.

Q. In what capacity would you say plaintiff's Exhibit "L" was written you by Mr. Foster, and I will ask you to read it?

A. Now what——

Q. In which of his dual capacities did he write that letter? Did he write it to you as an official of the Milwaukee or an official of the Minneapolis Eastern? I just want to understand how you determine that question?

A. I determine that as an official of the Minneapolis Eastern.

Q. It is signed by him as assistant superintendent, is it not?

A. He is my general superintendent.

Q. He says, "Assistant general superintendent"?

166 A. He was then.

Q. And you were the superintendent?

A. Yes, sir.

Q. Was he your assistant?

A. He is the assistant general superintendent. That is a step higher than the superintendent.

Q. Do you have any dealings at all with the president of the road, do you receive any directions from him?

A. No, sir.

Q. You don't come in contact with the president of the road in any way?

A. When I go to put money in the bank, that is 'all.

(Mr. Smith examines the witness as follows:)

Q. Are there any elevators on the Minneapolis Eastern which are also on the line of any other switching company?

A. Yes, sir.

Q. What elevators are those?

A. What we call the Pillsbury "B" and the Consolidated elevator, the Galax.

Q. What road is the Pillsbury "B" connected with?

A. The Minneapolis Western.

Q. And what line is the Northwestern Consolidated did you say?

A. The same line.

Q. Are there any elevators on the Minneapolis Eastern that are on any other line than the Minneapolis Western?

167 A. No, sir.

Q. Then there is no elevator that is on both the Railway Transfer of Minneapolis and on your line?

A. No, sir, I said there was on the Minneapolis Western, but the Railway Transfer—

Q. Your last answer is there is no one that is on both the Railway Transfer of Minneapolis and the Minneapolis Eastern?

A. No.

Q. You have bought rails of the Chicago, Milwaukee & St. Paul road have you not?

A. Well, yes.

Q. Did you buy any of the Omaha road?

A. Yes.

Q. Those are rails which they have used and have been for some reason or other discarded by those roads?

A. They are lighter rails.

Q. Have you ever bought any of any other roads than those two?

A. Well, not to my recollection in late years. I think we bought a few from the St. Louis one time.

Q. How many years ago was that?

A. That is when I was—in the early days. We had to get two or three rails to match what we had in those days.

Q. The great bulk of the rails you have been buying from those two roads as they wanted heavier rails to replace them?

A. Of late years, yes.

Mr. Sheean: How much rail did you buy of the Omaha?

168 A. Do you mean all told or just lately?

Mr. Sheean: All told?

A. It would be pretty hard for me to tell. We don't order but a few rails at a time to patch up our yard.

Mr. Sheean: How many rails do you order at a time?

A. Sometimes we order as low as ten rails. On new construction we have ordered quite a number of them.

F. H. BURDICK, being first duly sworn, testified as follows:

Examined by Mr. Sheean:

Q. Where do you reside?

A. Minneapolis.

Q. What official position do you occupy with the Minneapolis Eastern Railway?

A. I am the agent and accountant.

Q. How long have you been in the employ of that company?

A. Ten years.

Q. Do you keep the books of that company?

A. Yes, sir.

Q. What books are kept by you?

A. A ledger, auditor's voucher book and the balance of them are station accounts.

Q. Describe briefly,—withdraw that,—who makes the bills for services rendered to the Minneapolis Eastern Railway?

A. I do, made under my direction and in my office.

169 Q. What I mean is for the service rendered by that road?

A. I do.

Q. Who do you make the bills upon?

A. Most of the bills are made upon the railroad companies who deliver stuff and take it away.

Q. Does that include the railroad companies, all the railroad companies doing business in Minneapolis?

A. Well, we have a little local business, of some odd cars that are billed to industries on other roads.

Q. Do you have demurrage charges you collect?

A. Yes, sir.

Q. Now, who collects the moneys that are earned by the Minneapolis Eastern Railway Company on cars coming in from other roads and cars going out to other railroads?

A. The connecting lines, the railroad collects the charges and we bill on the roads. They pay us.

Q. All the railroads in Minneapolis?

A. Yes, all railroads in Minneapolis.

Q. Do you make any charges direct to the shippers for services rendered?

A. Yes.

Q. What are those charges for?

A. For switching charges.

Q. Are your switching charges collected by the other railroads in the same manner that switching charges are generally collected,—I mean does the railroad collect the charges for all switching service?

170 A. No, they absorb the greater portion of it themselves.

Q. Excluding that portion which is absorbed, do they collect the switching charge for the switching railroad where the charge is not absorbed?

A. I don't understand that. He don't talk loud enough.

Q. You have charge of the traffic matters of the Minneapolis Eastern, do you not?

A. Yes, sir.

Q. Do you file its tariffs?

A. Yes, sir.

Q. Are those filed with the railroad and warehouse commission of Minnesota?

A. Yes, sir.

Q. And with the interstate commerce commission at Washington?

A. Yes, sir.

Q. Do you receive or does that company receive reports or orders from the interstate commerce commission?

A. Yes, sir.

Q. Does that company receive transportation for its officials from other railroads?

A. Yes, sir.

Q. In other words, it is recognized under the law,—under the Federal law as a common carrier reporting to it and entitled to transportation?

A. Yes, sir.

Q. And these books are kept by you are they?

A. Yes, sir.

Q. And Mr. Jensch as I understand is the auditor of the company?

171 A. Yes, sir.

Q. And you are the accounting officer?

A. Yes, sir.

Q. What does Mr. Jensch have to do if anything with your work as an accounting officer?

A. I take my journal and ledger over to Mr. Jensch's office once a month. He compares them with my statements and O. K.'s them on the books.

Q. Does the Omaha Company have anything to do with the accounting that you do?

A. No, sir.

Q. Has the Milwaukee company anything to do with it?

A. No, sir.

Q. Does either railroad company dictate to you how your books shall be kept?

A. No, sir.

Q. As a matter of fact, are your books kept in accordance with the rules and regulations prescribed by the interstate commerce commission?

A. Yes, sir.

Q. They then are in the same general form as the books kept by all railroads in the United States?

A. Yes, sir, only abbreviated form of course.

Q. So far as the business required them?

A. Yes, sir.

Q. Do you file an annual report with the interstate commerce commission?

A. Yes.

Q. And one with the railroad commission of Minnesota?

172 A. Yes.

Q. Do you prepare or make out these reports which the

Minneapolis railroad is required to make under the safety appliance, hours of service, boiler act and accident reports?

A. Yes, sir.

Q. Forms are furnished you by the interstate commerce commission for the making of such reports, are they?

A. Yes, sir.

Q. Do you make special reports to the state commission as well as the interstate commerce commission when such reports are required?

A. Yes, sir.

Q. And they are required are they not from time to time?

A. They are.

Q. What about the gross earnings tax? Does this company pay a gross earnings tax upon its gross earnings?

A. Yes, sir.

Q. Does it pay a license tax or corporation tax to the United States government?

A. Why, its pays an income tax.

Q. I call that a corporation tax. It is the same thing. Has this company ever complied with the valuation laws of the state of Minnesota and valued its property?

A. Yes, sir.

Q. And kept up that valuation as required by the railroad commission and by the laws of the state?

173 A. Yes, sir.

Q. Does the Minneapolis Eastern comply with all the orders of the interstate commerce commission prescribing the form and character of the tariff?

A. Yes, sir.

(At this time an adjournment was taken until ten o'clock A. M., September 15th, 1915.)

Morning Session.

Mr. Root: Mr. F. A. Chamberlain is a pretty busy man and the other side have consented that we withdraw Mr. Houle for a few minutes and,—I mean Mr. Burdick,—so that we may excuse Mr. Chamberlain.

F. A. CHAMBERLAIN, being first duly sworn, testified as follows:

Examined by Mr. Root:

Q. Your name?

A. F. A. Chamberlain.

Q. What position do you hold with the First and Security Bank of this city?

A. President.

Q. You were formerly president of the Security National?

A. Yes, sir.

Q. And you have been engaged in the banking business about how many years?

A. For about thirty-five years.

Q. What office do you hold with the Minneapolis Eastern Railway Company?

174 A. President.

Q. How long have you been president, for about how many years?

A. Since the death of Governor Pillsbury, I think something over ten years.

Q. You succeeded Governor Pillsbury, did you not?

A. Yes, sir.

Q. Will you state in your own way what inducement there was that caused you to accept the presidency of the Minneapolis Eastern? Whether it was a salary arrangement or what it was?

A. Why, my recollection is I was visited by representatives of the railroad, the two roads, the Omaha and the Milwaukee, and they explained to me the position which Governor Pillsbury had occupied for so many years and gave me, as I recall, the reason for his being in that position.

Q. What were those reasons if you please, in general?

A. Governor Pillsbury was interested in the milling business and in various other business interests in the city and they regarded him as rather a representative of the interests that the road was supposed to favor and they explained to me that there was no salary connected with the position at all, but it was their wish that I take it if I cared to do so. I accepted the position at that time.

Q. Of course, it was understood by you I presume as by Governor Pillsbury, that this was a Minneapolis enterprise in connection with the milling interests?

175 Mr. Smith: Objected to as irrelevant and immaterial.

Q. Is it not your understanding it is a Minneapolis enterprise?

A. Yes, sir, absolutely.

The Court: I will receive it for what it is worth.

Q. Is this the only corporation or business enterprise you are connected with as president for which you receive no salary?

A. No, sir. I am president of the Lumber Exchange Company here, have been since the death of Mr. Akeley. I was asked to take that pretty much for the same reason. I did so, and have never received a penny of compensation for it.

Q. Are there any other you recall to mind at this time? It seems to me I recall you held some official position with the Northwestern Life Insurance Company?

A. I am a director in the Northwestern National Life Insurance Company.

Q. That is without compensation?

A. I have never received any compensation excepting for attending the meetings of the Executive Committee.

Q. I assume you have nothing to do with the operation of this railroad?

A. No, sir.

Q. With the operation as distinguished from the business of the road?

A. No, sir, I have nothing to do with that.

Q. And as president, do you take part in all matters of
176 the purchase of right of way and the issuing of bonds or the issuing of stock?

A. Well, I have always taken part in anything that affected the welfare of the road as it has been discussed in the stockholders' and directors' meetings. More especially perhaps that part which relates to the financing although I have had considerable to do with the real estate of the road. The right of way and matters in connection with that.

Q. As president what have you had to do with the making of contracts?

A. I have signed contracts. Of course the contracts which I have signed have always been talked over in the directors' meetings and I knew the purpose of them and approved of them.

Q. You preside at all directors' and stockholders' meetings?

A. Yes, sir.

Q. I think you have had personal charge in a way of the disputed claims if any there were, between that company and other companies? For instance, I think there was a matter of rental between the Minneapolis Eastern and the Great Northern?

A. Yes, sir.

Q. You have even given that personal attention outside of the directors' meeting?

A. Yes, I have made several visits to St. Paul and in other ways had to do with that.

Cross-examination.

Examined by Mr. Smith:

Q. Who were the managing directors of the Minneapolis
177 Eastern at the time you became president?

A. Well, I could not tell you without referring to the records. My impression is the same as now.

Q. That you said was eight years ago?

A. No, sir, I didn't say that. I could not tell you how long ago it was. It was shortly after the death of Governor Pillsbury. As I now think of it, it must be fifteen years ago, perhaps, I don't remember that.

Q. Your best recollection would be that Mr. Foster was one of the managing directors or the executive committee at that time?

A. No, I think not. I think Mr. Foster came in afterwards. Wasn't it Mr. Sewall, perhaps.

Q. Do you remember who were the persons who approached you for the respective roads for the purpose of obtaining your consent to become president?

A. I would not say positively.

Q. Then you don't remember now personally anyone who ap-

proached you on the subject only that your remembrance is it was the representatives of the Omaha and the Milwaukee roads?

A. Yes, sir.

Q. At that time what was your occupation, exactly?

A. I was the President of the Security National Bank.

Q. At the time, did the Omaha road have an account with your bank?

A. Yes, sir.

178 Q. And at that time did the Milwaukee have an account with your bank?

A. I am not sure about that.

Q. Have they had an account with you at any time since, the Milwaukee road?

A. It is my impression,—I am not real sure about this,—my impression is the Milwaukee road has not had an account with us at any time since I became president, but I cannot say positively as to that. They have an account with the First and Security National Bank. That, however, was with the First National Bank at the time of the consolidation.

Mr. Root: In 1902 is the date at which Mr. Chamberlain became president.

Q. State whether or not the Minneapolis Eastern had an account with you in 1902 at the time you were elected president?

A. I could not say. That had nothing to do with the matter of my decision with reference to the road at all, whether they had an account with us or not, I don't remember. It is a matter I could easily find out.

Q. Have they at the present time?

A. Yes.

Q. Do you know about what time that account was started, if it was after you became president?

A. No, sir.

Q. As president of the company would you not be apt to know where they did their financial business, in the banking line?

179 A. I think we had their account with us since I have been president and they may have had at the time, I think very likely they had at the time.

Q. That would be your best recollection, that it was there then and since you became president?

A. Well, the account has been with us I am quite sure since I have been president. I would not want to say as before, but I am quite sure there was no change made at the time, it was probably there before.

Q. Could you say about how many directors' meetings were held each year since you have been president?

A. We have held,—no, I could not say. I think I have attended every directors' meeting since I have been an official of the road.

Q. Would you say that there were any special directors' meetings ordinarily during the year?

A. Not as a general thing. My recollection is, however, that at

the time we had up some of these real estate matters with the Great Northern road we did have special meetings, although as to that I would not be positive.

Q. You know who has been the superintendent of this corporation?

A. Yes, sir.

Q. And have you ever given him in any way any orders or directions of any kind?

A. No, sir. I have consulted with him a good many times on matters we have talked over together, but I have given no instructions.

Q. Now, you may state with whom you had these conferences—perhaps you and I don't understand each other?

180 A. Mr. Trenholm, Mr. Clark, Mr. Foster, a good many times with Mr. Norris, the attorney for the road, and with the auditor who brought me the reports.

Q. Now, have you assumed to keep any particular track of the business of this company?

A. Yes, sir.

Q. Other than as it was brought to you from time to time?

A. I have tried to keep a general knowledge of the affairs of the road and I think I have been pretty closely in touch with the management and have always had their reports and keep them on file in my office.

Q. But you have not given it the attention which you give to your bank?

A. No, sir, I am at the bank every day.

Q. You don't consider that the burden of the affairs of this corporation or company rests upon your shoulders to the extent that they do upon the shoulders of Mr. Trenholm and Mr. Foster?

A. I have had nothing to do with the operation of the road, as to the actual operation of the road itself.

Q. Couldn't you say your relations to the road, outside of presiding at meetings, have been those of an advisor in financial matters—large financial matters?

A. Yes, I could add to that, too.

Q. And that your service outside of presiding officer has been limited to these few occasions when they have had large financial transactions?

181 A. Well, now, I have spent perhaps as much time in connection with the arrangements between the Great Northern road and the Minneapolis Eastern as in anything else and they were not purely financial. They were in reference to the right of way which is on the east side.

Q. You have had a misunderstanding, or lack of understanding with the Great Northern in regard to the use of that track on the east side?

A. That came up quite a number of years ago.

Q. And still exists, doesn't it?

A. Yes, sir. There has been no settlement of it.

Q. And the questions have at times assumed rather an acute form between the two roads?

A. Well, there has simply been a lack of agreement and that still exists.

Q. And during the entire period of your incumbency of the presidency you have had that disagreement with the Great Northern road over the use of the east side property of the Minneapolis Eastern track?

A. I am not sure whether they paid a rental there for a time or not. My impression is they did but I am not sure however, about that.

Q. Then could you say that your duties have been in relation to the larger financial transactions and difficulties with the Great Northern and practically only those?

A. No, I have had matters at times of bond issues.

Q. That is a large financial transaction?

182 A. Yes.

Q. You don't think of any others now?

A. Nothing especial.

Q. You have how much stock?

A. One share.

Q. Do you own that or do you know who does?

A. Why, it is in my name.

Q. Yes, but who is the real owner?

A. I could not say. I never paid for the stock.

Q. It is a qualifying share, is it not?

A. Yes, sir.

Q. I understand that you,—you were there because of your peculiar relations to the milling interests and that those relations were something like those which Governor Pillsbury had before you?

A. I was there in the same relation to the road that Governor Pillsbury bore to the road during all his term of office.

Q. Now, there are four members of that board who are connected and have been connected intimately with the Milwaukee road, are there not?

A. Yes, there is Mr. Sewall, Mr. Foster, Mr. Earling,—I don't remember the other.

Q. I don't refer to the executive committee, but to the board as it has been constituted during your presidency? There have been nine members?

A. Yes.

Q. And four of those have been Milwaukee members, or in Milwaukee sympathy and four in sympathy with the Omaha?

A. I think so.

Q. And you as between the two roads would represent a neutral?

183 A. Yes, sir.

(Examination of witness by Mr. Sheean:)

Q. In other words you were president as it were to represent the

interests of the Minneapolis Eastern Railway and the milling interests as reflected through that road?

A. Why I was there as I have always taken it possibly to act as between any interests that might,—any conflicting interests that might possibly arise. I think that was about the way, although I never had occasion to exercise any such position.

Q. Has the Omaha company ever attempted to dictate your actions—

A. Not in any way.

Q. Or to control you in looking after and managing the interests of the Minneapolis Eastern?

A. Not the slightest.

Q. Has the Milwaukee or any representative of it as such attempted such control or direction?

A. No, sir.

Q. As president you have acted, solely in the interests of the Minneapolis Eastern?

A. Absolutely.

F. H. BURDICK, recalled for further examination.

Examined by Mr. Sheean:

Q. What were the or what was the amount of money paid out by the Minneapolis Eastern last year for wages and salaries to its employees?

184 A. \$21,436.40. That is the year ending 1914, June 30th.

Q. What was the amount paid out during that year for operating expenses exclusive,—what was the amount paid out for supplies and materials and incidentals of that character?

A. \$14,391.82.

Q. Now, have you statements of the reproduction value as made by the railroad and by the railroad and warehouse commission?

A. Yes, sir.

Q. Have you it with you?

A. Yes.

Q. I call your attention to defendants' Exhibit 5 and I will ask you whether that is an itemized statement of the cost of reproduction new in 1906, plus addition and deduction from July 1st, 1906, to June 30th, 1915?

A. Yes, sir.

Q. What was the total valuation as made on June 30th, 1915?

A. \$1,088,390.26.

Mr. Smith: Counsel would like to see the statement.

The Court: You need not take that in the record until Counsel has seen the report, Mr. Reporter.

Mr. Smith: We think this is practically an attempt to prove the value of the entire plant of the Minneapolis Eastern and that it is equivalent to oral testimony and that in the peculiar circumstances in which it is offered, the witness has not shown himself qualified to value this plant and all material and think we ought

to be allowed to cross-examine as to his qualifications as a witness as to the value of this plant.

Mr. Sheean: The witness is not offered as a witness on valuation. He is simply asked to state what was the reproduction valuation made by the company and submitted to the railroad and warehouse commission. We would have to have our engineers and supply men and real estate men and our practical operating men to prove all that they did. I am just showing in compliance with the law we valued this property and filed our result with the railroad and warehouse commission. The railroad commission also valued this property and we have the record either the same or maybe somewhat less than the valuation placed upon it by the company.

Mr. Morley: If we permit that to go in, we have no way to show how that is made up. It don't seem to me it furnishes us a proper basis for cross-examination and I think we will object to it as incompetent.

The Court: If their purpose is simply to show they filed a certain statement and this is the statement on file, of course, for that purpose it might be received, but it would not be proper as evidence of value. If that is the only reason it is offered, I don't think of any objection that should be sustained at this time.

Mr. Morley: Not if it is merely offered to show they filed that report.

186 Mr. Sheean: That is all it is offered for.

Mr. Smith: Now if it is understood this is not received as evidence of value in any respect, we shall withdraw any objection but at the same time the witness has not shown that he prepared it or filed it or caused it to be filed but gives it as his conclusion that it was. Object as no foundation laid and so far as the value is concerned, the witness has not shown himself qualified to give the value.

The Court: The only objection is because of the fact that you claim it is not proper foundation to prove value? You have no objection to it going in as having been filed with the commission?

Mr. Smith: We object to it unless he states he filed it or knows it was filed.

Mr. Sheean: Mr. Burdick, do you know what the company paid out in the way of betterment and addition during the year between June 30th, 1914, and June 30th, 1915?

A. Yes, sir.

Q. What were those expenditures,—what was the total amount?

A. \$39,826.99.

Q. Are those expenditures which you should file with the railroad commission?

A. Yes, sir.

Q. Have you done that for the year 1915, ending June 30th?

A. There is some details of it that are not complete, I have not filed it yet.

Q. Now, with the exception of the details which have been referred to by you, does this statement marked defendants' Exhibit 5 represent the amount of value which has been filed with the railroad commission?

A. Up to that, yes, sir.

Q. Did you file this statement?

Mr. Smith: Wait. Objected to as not the best evidence. Read the last couple of questions.

(Questions read by the reporter.)

Mr. Sheean: If you object to this, I will call the man and show the state's valuation.

Mr. Smith: All right. We do object as not the best evidence.

Mr. Sheean: I insist the objection is not good.

The Court: Objection sustained.

Mr. Sheean: Defendants except severally.

Mr. Sheean: Defendants now offer in evidence the exhibit, defendant's Exhibit 5 for the purpose of showing that the amounts therein stated have been reported to the railroad and warehouse commission as the company's valuation of its property with the exception of a few items which have not thus far been filed.

Mr. Smith: We ask to cross-examine the witness on this offer.

Mr. Sheean: The Court ruled it out. Why do you want to cross-examine?

The Court: You may cross-examine.

(Examination of witness by Mr. Smith:)

Q. Do you know just when that statement was made up?

A. For this year?

188 The Court: It don't seem to me there is any use in wasting any time on this because what has been filed itself is the best evidence. This is not the best evidence and I will rule it out without any cross-examination if you make objection.

Mr. Smith: We do object.

The Court: Objection sustained.

Mr. Sheean: Defendants except.

(Mr. Sheean resumes examination of witness:)

Q. Have you prepared or caused to be prepared an income account,—what I call an income account,—I don't know as that is the proper term,—of the Minneapolis Eastern Railway Company?

A. Yes.

Q. Have you that account in your hands?

A. Yes, sir.

Q. Referring to defendant's Exhibit 6, I will ask you whether or not,—this is preliminary,—whether or not that shows the result of the operation of the Minneapolis Eastern for the year ending June 30th, 1914 and 1915?

A. Yes, sir.

Q. Has that been compiled from the books of the Minneapolis Eastern?

A. Yes, sir.

Q. That purports to show the operating revenues operating expenses, taxes, hired equipment and miscellaneous rent, doesn't it?

A. Yes, sir.

Q. It also shows the reproduction value of the property.
189 Now is that the reproduction value as made by the company or by the railroad and warehouse commission?

A. Made by the company.

Mr. Sheean: Now subject to showing hereafter what the reproduction value was as made by the company, the defendants would offer in evidence defendant's Exhibit 6. I appreciate, without putting that exception in, under the former objection this would be also excluded. We will show what the reproduction value as made by the company was—withdraw that.

Q. Do you know what was the value that,—what was the reproduction value that the company made and was placed upon the books of the company as such value? Do you know?

A. As shown by this report?

Q. As shown by the books of the company in your possession?

A. Yes, sir.

Q. You know that do you?

A. Yes.

Q. This value that was reported to you, was it by the officers of the company?

A. Yes, sir.

Mr. Sheean: Now, subject to proving by Mr. Jurgensen what the state's valuation thereof is, defendants would offer in evidence defendant's Exhibit 6.

Mr. Smith: May we see the exhibit?

Mr. Morley: So far as the plaintiff is concerned we do not object to any part of this statement except the last two lines
190 showing the reproduction value of the property and the ratio of return. The last two lines as I understand it from Counsel include not only the portion of the property on the west side which is operated, but also includes the value of the property on the east side which they do not operate, and they do not segregate it in any way and it don't seem to me it is a fair statement of value of the property on that account. This operating revenue is derived entirely from the operation of the west side track, yet the value includes the value of the east side track which is not operated and they are figuring the ratio of return on the entire valuation.

Mr. Sheean: We will withdraw that item, the last two items at the suggestion of Counsel. It is a mere matter of calculation, and then offer the exhibit subject to the withdrawal of the last two items appearing on defendant's Exhibit 6.

Mr. Morley: We do not object to that.

The Court: Received, subject to the two withdrawals.

Cross-examination.

Examined by Mr. Morley:

Q. You have been in the employ of the Minneapolis Eastern for how long?

A. Ten years.

Q. Where were you previously employed?

A. By the Milwaukee.

Q. In what capacity?

A. Traveling auditor for five years, the balance of the time I was an agent.

191 Q. How long were you in the employ of the Milwaukee road before you went into the employ of the Minneapolis Eastern?

A. About thirty-four years.

Q. Were you the agent of the Minneapolis Eastern who filed the tariff?

A. Yes, sir.

Q. To whom,—who did you succeed in that position, who was the previous agent?

A. Mr. A. E. Christian.

Q. How long did he occupy that position?

A. One year.

Q. With whom was he previously employed, do you know?

A. A gentleman by the name of Beech.

Q. By whom was Mr. Christian previously employed?

A. I don't know. I never knew him very much.

Q. Who preceded Mr. Christian?

A. Mr. Beech.

Q. How long was he agent of the Minneapolis Eastern?

A. About two years, or three years.

Q. In that capacity did he also have charge of keeping the books of account?

A. Yes, sir.

Q. Just as you do?

A. Yes.

Q. That is he was the general bookkeeper and in addition to performing those duties, he filed the tariff?

A. Yes.

192 Q. And you do likewise?

A. Yes.

Q. By whom was Mr. Beech previously employed before he entered the employ of the Minneapolis Eastern?

A. I could not tell you.

Q. At whose direction did you file and publish the tariffs of the Minneapolis Eastern?

A. Well, I do it on my own.

Q. With whom did you consult?

A. Mr. Foster.

Q. And publish the rates he directs you to publish?

A. Well, I told him what I want and got his permission to have it issued.

Q. Do you consult with anyone else?

A. I have consulted with Mr. Ober of the Omaha.

Q. He is the assistant freight traffic manager of the Omaha?

A. Yes.

Q. Has no connection at all with the Minneapolis Eastern?

A. None at all.

Q. When have you consulted with Mr. Ober?

A. Well, in making the tariffs the rules of the Interstate Commerce Commission have to be followed very closely. It is something I had had no previous experience with and I wanted to find out.

Q. Have you consulted him at all as to rates, or charges?

A. No, sir.

193 Q. At what other times have you consulted with Mr. Ober?

A. At no other times except in the matter of the tariffs.

Q. Just in respect to the form of the tariff?

A. Yes, just as to the form of it.

Q. For no other purpose?

A. No other purpose.

Q. Have you consulted at all with the traffic officials of the Milwaukee? Do they have any here?

A. I think I talked with Mr. Conley, who was the assistant general freight agent for the Milwaukee.

Q. What was the extent of your consultation with Mr. Conley?

A. Well, we had a set-back switch that we wanted to put in the tariff and I wanted to find out whether we could do it.

Q. That was the extent of your consultation with him?

A. Yes.

Q. Had either Mr. Conley or Mr. Ober ever offered any suggestion as to the rates or rules you published in that tariff as to what you should publish?

A. I don't remember, possibly they may.

Q. That is as to suggestions—

A. Advising me.

Q. Advising that you publish certain rules?

A. Yes.

Q. Did you make up the form of the rules yourself or did you take what they furnished you?

194 A. I wrote him a letter and told what I wanted.

Q. With reference to certain rules?

A. Yes.

Q. That is in regard to that set-back rule?

A. Yes.

Q. I mean in regard to suggestions that they make to you about publishing certain rules in the tariff. Do they furnish a rule to you and ask you to publish it?

A. No, sir.

Q. But they do make suggestions to you requesting certain rules or regulations be published from time to time?

A. I asked him if they should be published, some of them.

Q. And they advised you to do it?

A. They advised me they should be.

Q. Then you do it?

A. Yes.

Q. These matters you took up with Mr. Ober of the Omaha and Mr. Conley of the Milwaukee, whichever was the more convenient?

A. When I want advice, yes, sir.

Q. Do you consult with Mr. Conley relative to tariff?

A. To take cars from off the Milwaukee.

Q. And going to the Milwaukee at all?

A. No, sir.

Q. Were you ever in the traffic department of any road before you acted as such for the Minneapolis Eastern?

A. No, sir.

195 Q. You had no experience in traffic matters at all?

A. No, sir.

Q. You published the first tariff that was filed formally with the commission, did you not?

A. Yes, sir.

Q. There was an informal tariff filed before that time?

A. Yes, there was. With no number on it. Mr. Beech filed that.

Q. Filed the informal one?

A. Yes.

Q. Where did you get the matter which you incorporated in this tariff, with whom did you consult in making that up?

A. I got the greater portion of it from the switching tariff that was issued by the Minneapolis & St. Louis for the Railway Transfer.

Q. Who furnished you with that?

A. I asked the St. Louis for a copy of it.

Q. Who suggested that you ask the St. Louis for it?

A. Nobody.

Q. Did you consult with either Mr. Ober or Mr. Conley relative to that?

A. No, sir.

Q. Or with any official of the Omaha or the Milwaukee?

A. No.

Q. You just took the form of the Railway Transfer tariff and published the same one for yourself?

196 A. Yes, sir.

Q. According to the annual report which you filed with the railroad commission, in that annual report you make this statement as to the nature of the business of the Minneapolis Eastern, "Its business is transferring cars from the railroad to another, or an industry." Is that a correct statement?

A. Yes.

Q. To what extent does the Minneapolis Eastern engage in transferring cars between railroads?

A. Well, the Milwaukee has a car going to the Omaha. We take it from the Milwaukee and deliver it to the Omaha.

Q. What other roads?

A. We have cars going from the Great Northern to the Rock Island and going to the Milwaukee.

Q. What other roads?

A. The tariff says what we have direct connection with.

Q. You interchange between these roads with which you have direct connection?

A. Yes, sir.

Q. The C. B. & Q., the Chicago, Milwaukee & St. Paul, the Rock Island, the Omaha, the Great Northern and the Railway Transfer?

A. Yes, sir.

Q. Through the Railway Transfer, do you interchange for the St. Louis and other roads?

A. Yes, sir.

Q. Do you have any information as to the amount of this interchange business?

197 A. Why, I have a general idea.

Q. Well—

A. The books, of course, would show, the station records.

Q. What is the amount of it, in a general way?

A. The interchange between roads?

Q. Yes?

A. Probably about fifteen per cent.

Q. Can you state the amount of dividends which your company paid in 1905?

A. Yes, sir.

Q. What is the amount of it?

A. \$10,010.48. That was for the year 1905.

Q. That was prior to the issue of the stock dividend of \$95,000.00—that was issued in 1906, was it not, or 1907?

A. I don't know whether you call it a stock dividend.

Q. There was \$95,000.00 of stock issued in 1906 or 1907?

A. Yes.

Q. This dividend of \$10,010.48 was made prior to the issue of that \$95,000.00 worth of stock?

A. Yes, sir.

Q. At the time that \$95,000.00 of stock was issued no cash was received for it, was there,—there was not \$95,000.00 in cash paid into the company at that time?

A. No, sir.

Q. So it was in the nature of a stock dividend?

A. Why, I suppose that is what you would call it, I don't know.

198 Mr. Sheean: The facts are that the stockholders had not received dividends for a number of years and the Minneapolis Eastern had as a matter of fact been making a surplus and that surplus was reinvested in betterment and additions and when this \$95,000.00 of stock was issued it was issued for the purpose of covering the additions and betterment which had gone back into the company.

Mr. Morley: And which had been paid for out of the surplus earnings.

Mr. Sheean: Yes, as I understand it.

Q. At the time the dividend of \$10,010.48 was declared in 1905, the outstanding stock was \$30,000.00?

A. Yes, sir.

Q. Can you make up a statement of the traffic outbound on the Minneapolis Eastern destined to the Milwaukee and Omaha railroads as compared with the outbound traffic to other railroads during the past year?

A. No, sir.

Q. Cannot you make up such a statement from your books?

A. No, sir.

Q. Don't you have any information to show how many cars of outbound freight went to the Milwaukee during the past year?

A. Why, I have the information but it has never been made up, never been asked for.

Q. Could you not make up such a table and file it?

A. It could be made.

199 Q. Will you prepare a statement showing the number of cars which you delivered from the Minneapolis Eastern to the Milwaukee and the Omaha outbound, loaded, revenue cars, during 1914 or 1915 and a like statement showing the cars delivered to the other roads?

Mr. Sheean: How long would it take you to prepare such a statement, such as Counsel refers to?

Witness: A couple of days. Filed Ex. 6-A.

Court: Received.

Mr. Morley: The only purpose is to show to what extent the ownership of the Minneapolis Eastern tends to benefit the Milwaukee and the Omaha railroads at all.

Mr. Root: Then I think you should ask for the inbound as well as the outbound.

Mr. Sheean: We will have that statement prepared and by consent of Counsel it may be put in the record by the reporter.

Mr. Morley: Yes.

Mr. Sheean: I am assuming you don't want any foundation laid for the witness' qualifications?

Mr. Morley: Not at all.

Q. Your tracks which you own on the east side of the river are not operated by the Minneapolis Eastern at all?

A. No, sir.

Q. Have never been operated by the Minneapolis Eastern?

A. Not to my knowledge.

200 Q. You have no means of getting over to the west side tracks from the—you have no means of getting from the west side tracks to the east side tracks, no track which connects the two?

A. No, sir, no track connects them.

Q. And you have no engine running on the east side at all,—that is operated by the Great Northern railroad?

A. They are in possession of it.

Q. And operating it?

A. Yes.

Q. And each month you charge on your books a certain sum as rent against the Great Northern, do you not?

A. Yes, sir.

Q. And send those bills to them?

A. Yes, sir.

Q. And the Great Northern returns them and refuses to pay them?

A. Yes, sir.

Q. And that is an unsettled matter between the two railroads?

A. Yes, sir.

Q. And your entire operating income is derived from the operation of your tracks on the west side of the river?

A. Yes.

Q. And you render no expense bills?

A. Yes.

Q. You render no expense bills to the shipper of grain when it comes in for your switching charges?

A. Certainly we make bills.

Q. Against the railroad?

A. Mostly on the railroad.

201 Q. Almost exclusively is it not?

A. Yes.

Q. The business that comes from the Milwaukee and the Omaha railroads and is delivered to industries on your line, your bills are made against the Milwaukee and the Omaha and not against the shipper?

A. On cars for shipment, it is made against the railroads.

Mr. Sheehan: These bills are rendered against the railroad.

Q. It is the same as to all other railroads?

A. Yes.

Q. Your bills are rendered against the railroad and not against the shipper?

A. All railroads.

(Mr. Smith examines the witness as follows:)

Q. Will you state exactly what rules you have and what you do in collecting your charges for cars, or a separate car, any car delivered you by the Milwaukee road?

A. Bill on the Milwaukee railroad, make a bill against them.

Q. Now what is done next so far as you know?

A. You mean what they do?

Q. That you know of. I don't want to go into things you don't know about, but what is your next entry which relates to that subject?

A. Why, charges that we should collect under our tariff we collect it from the owner of the stuff.

Q. What comes to you, if anything?

202 A. Nothing comes to me except our charges, my charges.

Q. Where is the next entry made in regard to that particular charge, by you?

A. It is entered on the ledger charged against the company.

Q. There must be in time some entry crediting the company with something isn't there?

A. Credited whatever is collected by the treasurer.

Q. What comes to you from the treasurer?

A. I get his cash book and check my books with his cash book.

Q. What entry do you make after you receive the treasurer's cash book?

A. I credit the ledger account by the treasurer, whatever amount of money he collected.

Q. And how long a time is there ordinarily between the time you make the charge against the Milwaukee company and you make the credit to that Milwaukee company?

A. Thirty days.

Q. Is the treasurer's cash account rendered to you once in thirty days?

A. Yes, sir.

Q. On any particular day of the month?

A. No, near the close of the month. Any day after they get their collections in, get it balanced up and check it to the bank.

Q. Does his cash book have accompanying it to you a check on the bank?

A. Yes, sir.

203 Q. Then when the Milwaukee receives this money you know that it does put it in the bank at that time or at some time?

Mr. Sheean: You mean the Minneapolis Eastern don't you? You asked whether the Milwaukee received the money.

Mr. Smith: He says he gets the cash book from the treasurer at the end of the month.

Mr. Sheean: He means the Minneapolis Eastern, he gets it from the treasurer of the Minneapolis Eastern, Mr. Foster.

(Question read by the reporter.)

Mr. Sheean: The Milwaukee don't receive any of the money,—you mean the line haul charge.

Mr. Smith: It has been testified to several times the Milwaukee is the collection agent for the Minneapolis Eastern to the extent that it handles cars that come in over the Milwaukee.

Mr. Sheean: Just as all other roads are collecting agencies for like charges.

Q. You yourself don't handle any money, cash?

A. No, sir.

Q. But you do handle certain checks, or don't you handle those?

A. Yes.

Q. And the checks go through your hands?

A. Yes.

Q. Those checks are checks by the Milwaukee on its account?

A. Yes, sir.

Q. Now is it on its account or a check by Mr. Foster?

204 A. It is on the Milwaukee's account, that is in payment of switching bills.

Q. Then if I understand you right, you get the checks back at the end of the month from the Milwaukee for what they owe the Minneapolis Eastern?

A. I get a draft on the treasurer, is what we get, issued by the agent of the Milwaukee road, to the Minneapolis Eastern.

Q. And that is a check on their account is it?

A. Yes, sir, the same as all the rest of the roads.

(Mr. Sheean examines the witness:)

Q. You get from each of the railroads their draft covering the amounts they have collected for you as switching charges earned by the Minneapolis Eastern, do you?

A. Yes, sir.

Q. You don't treat the Milwaukee or the Omaha any different from any of the other seven railroads in Minneapolis?

A. No different at all.

Q. Now, referring to Mr. Ober. He doesn't give you any directions or controls your actions in regard to your rates or tariff, does he?

A. No, sir.

Q. You consulted him because of your lack of familiarity with the rules and regulations of the interstate commerce commission in regard to the form of tariff that you filed?

A. Yes.

Q. In other words, you went to him as you would with any other traffic man you knew?

205 A. Yes.

Q. For information as to the rules and regulations?

A. Yes, sir.

Q. Now, Mr. Conley, I understand you, you had some talk with him about a set-back charge?

A. Yes.

Q. Did he give you,—determine what you should do in regard to that?

A. No.

Q. What were you looking for there,—information?

A. Well, there was quite a controversy as to the legality of the charge and I consulted with Mr. Flynn of the railroad and warehouse commission in regard to this matter, had quite a controversy with him.

Q. You were trying to find out what the law was in regard to the charge, were you?

A. Yes.

Q. Did Mr. Conley give you any direction or attempt to control your actions as an employee of the Minneapolis Eastern?

A. No.

Mr. E. R. BARBER, being first sworn, was called as a witness for the plaintiff.

Examined by Mr. Morley:

Q. State your name and place of residence?

A. Edwin R. Barber, Minneapolis.

Q. And your business?

206 A. President of the Barber Milling Company.

Q. Were you ever connected with the Minneapolis Eastern Railway?

A. Yes.

Q. And that was in what capacity?

A. Secretary.

Q. At what time?

A. In 1878 up until about 1879, possibly two years.

Q. Were you one of the incorporators of the company?

A. I think so.

Q. A member of the board of directors?

A. Yes.

Q. State whether or not,—state the circumstances under which that company came to be incorporated?

A. The millers were very anxious to have a railroad built in the rear of the mills on the bank of the river and we had been hauling our flour across by team and wheat in from the elevators by team so,—I don't know, of course I was a very young man at the time—my father happened to be away at the time this first meeting occurred and the millers met the officials of the Omaha and the Milwaukee road at the old Nicollet House and the road was organized at that time.

Q. Well, to what extent did the millers participate in that and to what extent did the Omaha and the Milwaukee?

A. Well, they were all there at that meeting, they were all in favor of having the road built.

207 Q. What if any request was made by either of the two roads as to the millers incorporating the company?

A. As I recall it, the statement was made that they had to procure a charter under the laws of Minnesota of course and they wanted the millers to assist in organizing the road.

Q. Who made that statement?

A. I could not say who made that statement.

Q. Was it one of the railroad officials?

A. Well, I could not swear as to who made the statement, but the millers were asked to meet the railroad people there as I understand it.

Q. And to incorporate this company?

A. Yes.

Q. Now when,—one share of stock only was issued to each of the incorporators?

A. I don't recall that. There was one share issued to me.

Q. You paid nothing for it?

A. I don't think I did.

Q. And never put any money into the company?

A. No.

Q. And within a year or two the stock of the company was issued to the railroad companies?

A. Yes.

Q. Is that correct?

A. I think so.

Q. Then the millers——

Mr. Sheean: I would suggest, this is early history and faint recollection and I don't think you should lead quite so strongly.

208 Q. How long did the millers continue their connection with the company?

A. I think they always had a miller for president of the road. Major Bassett was president for many years and I think they always had a miller in as president.

Q. To what other extent did the millers participate?

A. That I don't know. I think I dropped out as secretary after the organization and perhaps possibly they had two or three other meetings, that was about all.

Q. Your connection with the company was very formal?

A. Yes. I was the youngest man there and I suppose they put the work of being secretary on me, but I recall very little about it. That was thirty-five or thirty-seven years ago.

Cross-examination.

Examined by Mr. Sheean:

Q. Did you keep any minutes of those meetings which you attended in 1878?

A. Yes, sir.

Q. The directors met did they during that year a number of times?

A. Not a great many times, possibly two or three times until the organization was in effect.

Q. Were you present in person at this meeting where they discussed the advisability of incorporating the company for the construction of this road?

A. Yes.

209 Q. When they discussed the advisability of constructing this Minneapolis Eastern?

A. Yes, sir, I was present at that meeting.

Q. Who were present there besides yourself?

A. I think Mr. C. A. Pillsbury, Mr. C. H. Pettit, Mr.,—I think one of the Days, I don't know whether Mr. Leonard Day, or Mr. Rollins, his son-in-law. I think Mr. S. S. Merrill and Mr. John Gault.

Mr. Morley: Who was he?

A. General manager of the Milwaukee, or general freight agent.

Mr. Morley: Who was Mr. Merrill?

A. He was the general manager of the Milwaukee at that time. I am not certain whether Mr. H. H. Porter, the president of the Omaha, was there. Mr. Frank Clark, of the Omaha.

Q. As a matter of fact, you mean the Chicago, St. Paul & Minneapolis Railway Company, do you not?

A. Yes.

Q. Now, did that company acquire any right of way after filing articles of incorporation and while you were secretary?

A. I think it did. I remember Governor C. C. Washburn was living at the Nicollet House then, I recall his stopping to speak with my father. We were to build an elevator in the rear of our mill to go out to the trestle of the Eastern and I know we had quite a controversy as to Mr. Washburn allowing us to build out there. He claimed riparian rights on the river for the Minneapolis Mill Company, of which he was president, and my father said we had to get out to the railroad and we had a very early deed. There was nothing in our deed that prohibited us going to the center of the river, but it was finally settled that we would be allowed to go out there and the Governor gave us a quit claim deed I remember and at the time he said that the Minneapolis Eastern wished a right of way there and he was giving them a right of way simply for railroad purposes, not to interfere with his riparian rights. I recall that conversation. So they evidently secured a right of way.

Q. When was this meeting at the Nicollet House?

A. This was early in the spring, I remember it was a very warm day and we sat in the old parlor of the Nicollet House on the Nicollet side with the windows up, early in the spring of 1878.

Q. Do you know whether while you were secretary, the company began condemnation proceedings to acquire certain parts of the right of way which had not been—

A. I didn't have anything to do with that. My duty was simply to take the minutes of the meeting. I didn't pay but very little attention to it.

Q. Do you know what work was done in 1878 in the way of construction or operation of this Eastern railroad?

A. I think construction was commenced either that fall or next spring. I would not say just when. I only know that by circumstances connected with it and our building out to that trestle. That was a wooden trestle originally and I think we built out there in 1879 or 1880 and that road was in operation about that time if I recall right.

Q. You say it was in operation?

A. I think so.

Q. Do you know whether the line had been laid out and a survey made in 1878?

A. No, sir, I don't know that.

Q. Do you know whether any of the other millers conveyed a right of way to the Minneapolis Eastern?

A. No, I don't think they did. I don't think it was necessary. I don't think their deeds went beyond the river bank.

Q. In other words, the Minneapolis Eastern either had to acquire by purchase or condemn this right of way?

A. One of the two, certainly.

Q. The millers had no property as you recall to convey to them for right of way purposes?

A. I don't think so. If they did have possibly down at the lower end toward the old Palisade mill, they might have had some property, but I doubt if any of them had anything except the river bank. If they had they would probably have given it to them because they were anxious to have the road built.

Q. Did I understand you to say you were the secretary about a year and a half?

A. I think so, I think about that time.

Mr. Morley: Do you recall who succeeded you as secretary?

A. No, sir.

212 D. F. JURGENSEN, being first duly sworn, testified as follows:

Examined by Mr. Sheean:

Q. Where do you reside?

A. St. Paul.

Q. What official position do you occupy with the state of Minnesota?

A. I am the engineer for the Minnesota Railroad and Warehouse Commission.

Q. Were you such engineer in 1906?

A. I was the principal assistant chief engineer.

Q. Did you at that time get for the state a valuation of the railroad property, of all railroad property in Minnesota?

A. Yes, sir.

Q. Since 1906,—did you at that time make a valuation of the Minneapolis Eastern Railway property?

A. The department did, yes, sir.

Q. Have you since that time kept account or charge of the valuation matter?

A. Yes, sir, that is my duty, one of them.

Q. Can you tell us,—withdraw that,—what was the valuation in 1906, plus the additions and betterments which had been made subsequent to that time, to June 30th, 1915, as made by you as a representative of the state of Minnesota and by the state, that is the total valuation?

A. Let me understand your question. What you want to know as I understand it is approximately what the commission would
213 consider the fair present value of the property as of June 30th, 1914. Is that your question?

Q. Well, hardly that way. I wanted to know what valuation the state through its accredited officers placed upon the Minneapolis Eastern in 1906?

A. To set you clear on that, I don't think the state placed a value on that property as of June 30th, 1907. The valuation as a whole, as I recall, was rejected by the state.

Q. Do you mean to say the state made no valuation of the property the defendants own?

A. The state found certain values for the certain elements. I would have to add them up to give them to you.

Q. If it is going to take a long time I will withdraw you and have you do that. I wanted to ask you two questions. What is the present valuation of the Minneapolis Eastern as valued by the state; and second, what is the value of the east side property of date June 15th, 1915.

A. I cannot give you that as of June 30th, 1915. I can give it to you as of 1914. I can give you that right now. The west side property, \$500,593.41. That is the present value of the physical property as of June 30th, 1914.

Q. What was the valuation placed upon the east side property?

A. \$104,272.23.

Q. Have you any report of the additions and betterments made for the year 1915?

A. No, sir, not yet. The company promised to have them
214 filed by September 1st, but to date they have not been received. They are not due legally until December 31st.

Q. Mr. Burdick is mistaken when he said he had reported to you about the major portion of this?

A. Certainly. There has been no addition to the property of the Minneapolis Eastern on either side of the river since 1907 except the land purchased on the east side amounting to \$104,000.00 and a sale to the St. Louis amounting to \$12,000.00 in land. Those are the only physical additions that have been made in the last seven years excepting what have been made during the last fiscal year.

Q. They have put up office buildings and round-houses and engine houses, and have rearranged their tracks and leveled up their tracks?

A. Yes, sir, since the close of the fiscal year of 1914.

Q. From 1906 then to 1914——

A. There has been no improvement excepting land which I have noticed, no addition to the physical property except land I have noted, but between 1914 and 1915 they have put in a few tracks and some new buildings and those are the details that have not yet been filed.

Mr. Smith: May it appear of record what Mr. Foster just said?

Mr. Foster: The Minneapolis Eastern took possession of the tract
of land purchased last year on June 1st, 1914.

215 The Witness: Block 17, town of Minneapolis.

Mr. Foster: The reason we could not get possession before was because it was under lease and we could not take possession until the tenants vacated, which was June 1st, 1914.

Cross-examination.

Examined by Mr. Smith:

Q. Have you made a valuation of the improvements made by the Minneapolis Eastern since the expiration of the fiscal year ending June 30th, 1914?

A. No, sir.

Q. These plats are all alike?

A. Yes, sir.

Q. Will you state what this,—witness is shown Exhibit "M"?

A. Exhibit "M" is a map drawn on a one hundred foot scale, prepared by our department showing the property,—the physical property of the Minneapolis Eastern Railway into the city of Minneapolis to date.

Q. Please state what the red lines signify?

A. The red lines intend to portray the right of way, that is the land used for right of way purposes as owned by the company. The boundary line of the right of way owned by the company as of today.

Q. State whether or not there are any other matters on that map than the general features of this territory together with the tracks of the Minneapolis Eastern?

216 A. Yes, it shows the physical connections with the surrounding roads and the industries, spurs, and so forth.

Q. Are there any other roads in the territory shown than those which are portrayed on this plat?

A. Of course, there is this to be said—the roads that operate under lease, for instance the Great Western Company at the Union Station use the Great Northern and the Rock Island uses the Milwaukee, although they themselves own no direct connecting track with the Eastern. The Omaha is in that same category.

Q. To the extent which you have stated, this is a correct plat of the property of the Minneapolis Eastern Railway?

A. Yes, sir.

Mr. Smith: We offer Exhibit "M" in evidence.

Mr. Sheean: This exhibit does not show the tracks of the Great Northern company between the property of the Eastern and the river, does it?

A. It doesn't show all the tracks. We did not carry that to that extent, but we do show the physical connections.

Mr. Sheean: The purpose of this map is simply to show the physical connections of the Omaha and the Milwaukee with the Minneapolis Eastern?

A. Yes.

Mr. Sheean: And this map does not show then what connections the other seven railroads of Minneapolis have with the property of the Minneapolis Eastern?

217 A. I would not say quite that. It does show all the important physical connections over which all the roads operate. It does not pretend to show all the tracks in that territory.

Mr. Sheean: The real purpose of this as I understand it is to show that the Minneapolis Eastern has practically only two physical connections, the Omaha and the Milwaukee, when as a matter of fact it has connections with all railroads, hasn't it?

A. Surely, but that don't distort the purpose of the map.

Mr. Sheean: The map is only partial, it is not complete?

A. It is intended to show the property of the Minneapolis Eastern Railway and its connections with adjoining roads, the joining

means of the only roads who own property.

Q. What property?

A. The railroad property which makes the connections.

Mr. Sheean: Have you shown the physical connections there that the Minneapolis Eastern has with other railroads?

A. I think all the physical connections are shown.

Mr. Sheean: As a matter of fact, all railroads in this city have either physical connections with the property of the Minneapolis Eastern or they have trackage rights which gives them that connection?

A. I think that is true, yes, sir.

218 Mr. Sheean: I understood you to say the Omaha company of course has trackage rights and is not the owner of tracks which give it access to the Minneapolis Eastern?

A. Yes, sir, use a portion of the Great Northern to get on.

(At this time a recess was taken until 2 o'clock P. M.)

Afternoon Session.

J. H. FOSTER, recalled by Mr. Sheean:

Q. Does either the Omaha company or the Milwaukee company operate under its own control any engines, cars or trains on the tracks of the Minneapolis Eastern Railway?

A. No, sir.

Cross-examination.

Examined by Mr. Morely:

Q. You occasionally furnish engines to the Eastern which they use, your locomotives, once in a while?

A. When the Eastern needs power, additional power or if one of their engines goes to the shops for repairs they rent an engine, or whatever power they need from some other road.

Q. Generally from the Milwaukee is it?

A. Yes, sir.

Q. Does that happen frequently?

219 A. About once a year. The engines require an overhauling about once a year, although I don't think in the past year they have had any power from either company.

Q. Now in regard to the distance which you gave yesterday from your south yard to the Empire elevator and to the Christian mill. Can you make any further statement as to those distances?

A. Yes, I have this scaled up since I left here at noontime. Do you want me to make the statement?

Q. Yes?

A. The distance from the South Minneapolis to elevator C, that is the Empire elevator that was mentioned here yesterday—

Q. South Minneapolis is your South Minneapolis yard?

A. Yes. It is 8,100 feet. From elevator C to the Consolidated

mill is 5,000 feet by rail, that was the mill mentioned yesterday, it scales on the map 5,000 feet.

Q. It is 5,000 feet in addition,—to get the distance from the South Minneapolis yard it is the distance to the Empire elevator plus that 5,000 feet, beyond?

A. Yes, sir.

Q. Now the distance from the South Minneapolis yard to the Christian mill?

A. The distance from the South Minneapolis yard to the Christian mill is 18,500 feet.

Q. How does that distance divide, how much of it is on your short line track and how much on the switch track?

220 A. From South Minneapolis, just east of the short line bridge where there is a connection for the east side spur, is 9,000 feet.

Q. From that point on to the Christian mill is——

A. 9,500 feet.

(Mr. Sheean examines the witness:)

Q. Why does the Eastern rent engines to the Milwaukee company?

A. I have not said that the Eastern did rent engines to the Milwaukee company.

Q. From the Milwaukee company?

A. Well, because the Eastern only has two engines and in case, as I stated, one of the engines goes to the shop for repairs——

Q. Why does it rent it from the Milwaukee rather than from the Omaha?

A. Because it is more convenient, that is all.

Q. For how long a time are those engines rented as a rule?

A. Sometimes two or three weeks, just as necessity requires.

Q. But the rented engine you refer to moves under the control and under the power of the Minneapolis Eastern Railroad?

A. Yes, sir.

Q. Is it true that the yards and facilities of the Milwaukee are very close to and adjoining the Eastern?

A. Yes, they are.

221 (Witness examined by Mr. Smith:)

Q. I wish you would show me on this plat "M," show the Court as near as possible the place where usual delivery of incoming wheat is made by the Milwaukee road to the Minneapolis Eastern?

A. I can show it better on my own map, and I think Mr. Houle could testify to that better. I think on this map I know just the tracks that were set aside for that delivery. Those are the tracks (indicating).

Mr. Root: They are two tracks indicated upon Exhibits 1 and 2 that are directly south of block 16 indicated on the blue print as "transfer to Eastern," the other "transfer from Eastern" so they

can be designated in that way. They are directly west of Sixth Avenue South.

The Court: I have in mind that is the same as north, is it not?

Mr. Root: It would be northwest.

Mr. Foster: Our terms are east and west and this is north, up the river.

The Court: I think generally speaking we rather estimate or think that the river goes north and south and if it is up the river, that is not directly so. The main thing is to get it fixed in my own mind.

P. C. SANBORN, being first duly sworn, testified as follows:

Examined by Mr. Morley:

Q. By whom are you employed?

A. Chicago; Milwaukee & St. Paul.

222 Q. In what capacity?

A. Chief clerk in the assistant general freight agent's office.

Q. You have charge of the tariffs do you?

A. No, sir.

Q. You are familiar with the tariffs and know under what conditions you absorb on traffic destined to or from the Minneapolis Eastern?

A. In a general way.

Q. Just explain, or let us read the provision of the tariff into the record?

A. I guess that will be the best way. "Unless otherwise provided rates on carload shipments covered by tariffs of this company will include switching charges to connecting lines at point of shipment, or destination or both; also the switching charge of the intermediate carriers as per tariffs lawfully on file with the interstate commerce commission when freight charges are fifteen dollars per car or more, but where freight charges are less than fifteen dollars per car the rates will include such portion of connecting line switching charges as will leave same net revenue as would accrue after absorption of switching charges above authorized out of the charge of fifteen dollars per car except that the provisions of this rule when applied to traffic handled at Chicago will cover only traffic consigned to or received from industries having private or individual tracks on the Chicago, Milwaukee & St. Paul Railway."

223 Q. Now, under that tariff provision if a carload of any commodity other than grain originates on your line and destined to an industry on the Minneapolis Eastern, the Milwaukee would absorb the switching charge?

A. I think it is safe to say yes. There are very few tariffs that provide specifically for switching in that case that would not obtain but the general rule would be——

Q. The general rule would be the Milwaukee would absorb as to any other commodity than grain?

A. Yes.

Q. Did you read the exception as to grain?

A. I did not.

Q. Read it please?

A. "Switching charges of connecting lines will not be absorbed as to grain, grain products or seed when for cleaning houses, elevator or mills located on connecting lines at Kasota, Minnesota, except on barley from St. Paul, Minneapolis and Minnesota Transfer, Minnesota; when originating beyond destined to stations in Illinois and Wisconsin—Minneapolis, Minnesota, or Kansas City, Missouri."

Q. Under that exception to the tariff, a carload of grain originating at any point on your line and finally delivered to an industry on the Minneapolis Eastern, your road would not absorb the switch?

A. No, sir.

Q. You would absorb the switching charge of the Minneapolis Eastern on flour outbound?

A. Yes, sir.

Q. So practically the only exception where you would not
224 absorb either to or from the Eastern would be in the case of grain?

A. Yes.

Mr. Sheean: The absorption is subject to the condition that the line rate is fifteen dollars or in excess thereof?

A. Yes, sir.

Mr. Sheean: Defendants will offer in evidence Exhibit 7, which is a copy of a resolution adopted by the board of directors of the Minneapolis Eastern Railway Company on June 28th, 1905.

Mr. Morley: You offer just that one resolution?

Mr. Sheean: Yes, the resolution referred to appearing upon this exhibit above the signature of Mr. E. D. Sewall, secretary, the first resolution.

Mr. Morley: We have no objection.

The Court: Received.

Mr. Sheean: Defendants' Exhibit 8 is offered in evidence by the defendants, same being a transcript of testimony which was offered before the railroad and warehouse commission in this proceeding when it was pending before that commission.

The Court: Received.

Mr. Sheean: Defendants offer in evidence Exhibit No. 9, which is the local tariff of the Chicago, St. Paul, Minneapolis & Omaha Railway Company of interchange switching charges, special service, short haul transportation; also absorption of switching charges
225 on carload and less than carload freight at stations on the C., St. P., M. & O.—particular attention being called to that portion thereof which appears on pages 4 and 5.

Mr. Morley: Mr. Sheean, is it not a fact at the time the dividend referred to in the resolution adopted June 28th, 1905, marked defendants' Exhibit 7, was declared, that there was only \$30,000.00 of outstanding stock of the Minneapolis Eastern Railway?

Mr. Sheean: I think certificates of stock for thirty thousand dollars were all that had been issued. The company, however, treated

the stock as owned and held but without certificates having been issued.

Mr. Morley: There was no additional stock issued until some two years later?

Mr. Sheean: The certificates were not issued until later.

The Court: Exhibit 9 is received without objection.

Mr. Sheean: The Omaha rests.

Mr. Root: The Milwaukee rests.

Mr. Morley: We have had quite a bunch of correspondence handed to us which I have not had an opportunity to read over. May we take a five minutes' recess to look over this correspondence we have had handed to us?

Mr. Sheean: I would suggest you put it all in and we can cull it out afterwards.

226 Mr. Morley: I don't know that I will have to offer anything at all.

(At this time a short recess was taken.)

Mr. Morley: We offer in evidence plaintiff's Exhibit "N," being extracts from the minutes of meetings at which any mortgage bonds were issued.

The Court: Received without objection.

Mr. Morley: We offer in evidence an extract from page 8 of the annual report of the Minneapolis Eastern Railway Company for 1887, reading as follows: "Q. 14. When and to whom was the original stock owned by the company sold and what was the cash value realized by the company for the same? A. Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company; thirty thousand dollars."

Mr. Sheean: No objection.

The Court: Received.

Mr. Morley: We offer in evidence page 17 of the annual report of the Minneapolis Eastern for the year 1907 and I will read into the record the material part, "Total number—I think I will withdraw that. I don't think it is necessary to encumber the record. I offer in evidence page 11 of the annual report of the Minneapolis Eastern for 1909: "Q. 7. Did any other corporation or corporations, transportation or otherwise control the respondent on June 30th, 1909? A. Yes. Q. If control was so held state (a) the form of control, whether sole or joint? A. Joint. (b) Name of controlling corporation or 227 corporations? A. Chicago, St. Paul, Minneapolis & Omaha Railway Company; Chicago, Milwaukee and St. Paul Railway Company. (c) The manner in which control was established? A. Through ownership of capital stock. (d) The extent to control? A. Each of the above named companies own one-half of the capital stock. (e) Whether control was direct or indirect? A. Direct."

Mr. Sheean: No objection.

The Court: Received.

Mr. Morley: The annual reports of 1910, 1911 and 1912 contain similar statements.

Mr. Sheean: On your statement, I will assume they do.

Mr. Morley: They are right here and you may look at them.

Mr. Sheean: It is noted that the stock control and none other is involved in that showing and the law distinguishes between stock control and actual control.

Mr. Morley: Well, whatever it means, it will stand for what it is worth.

Mr. Smith: I should like to recall Mr. Houle for one question.

PETER HOULE, recalled.

Examined by Mr. Smith:

Q. Where is the actual place of delivery of inbound wheat
228 by the Milwaukee to the Minneapolis Eastern?

A. Commencing about 8th Avenue South and runs down to between 5th and 6th Avenues; holds twenty-eight cars.

Q. Where is the actual place of delivery,—actual delivery of inbound cars of wheat coming on the Omaha and delivered by the Omaha to the Minneapolis Eastern?

A. Well, it is north of Fourth Avenue North and at times it is north of Plymouth Avenue North, which is known as their north yard. They go from the Plymouth Avenue North yard and when they have time and room and they feel like it, they put it down on Fourth Avenue North.

Q. What part proportionately of the incoming grain on the Omaha is delivered to you at Fourth Avenue North and Plymouth and what part the other way, in your judgment?

A. That is pretty hard to say because it is mixed in with cars coming to the Milwaukee and they don't separate it. If it is for the Minneapolis Eastern transfer that is throwed together. We do all transfers to the Milwaukee and they just put so many cars on there and if it happens to be all wheat for the Eastern all right or if it is all Milwaukee it is just the same.

Q. Then you are unable to make even an approximate judgment of the proportion of cars coming in the two different ways?

A. I could not very well.

Q. State whether or not the Omaha has any cars delivered
229 to you over the Minnesota transfer,—the Railway transfer of Minneapolis?

A. Not from the Omaha.

(Witness examined by Mr. Sheean:)

Q. Where is the place of actual delivery of cars which you receive from the Great Northern?

A. The other side of the Union depot, between Hennepin Avenue and Third Avenue North.

Q. Where is the actual delivery of cars received from the Northern Pacific?

A. In the railway transfer at 20th Avenue South.

Q. Where are the Rock Island cars delivered to you?

A. In the Milwaukee yards, the same as the Milwaukee.

Q. Where are the Great Western cars?

A. The Railway transfer at 20th Avenue South.

Q. Where is that place of delivery located?

A. Well, it is between 20th Avenue South and below 10th Avenue; along about 11th or 12th Avenue I think the end of the track comes.

Q. Where does the Soo Line deliver its cars destined to points on the Eastern?

A. In the Railway transfer yard.

Q. And where does the Burlington deliver its cars destined to those points?

A. Wheat comes via the Great Northern; empties come by the Railway transfer.

Q. How about the Minneapolis & St. Louis; where do they
230 make delivery of cars to you destined to industries on the Eastern tracks?

A. Railway transfer.

Q. Most of the railroads make deliveries at the Railway transfer?

A. Well, a number of them, yes.

Q. Well, some of them?

A. Yes.

Mr. Morley: Mr. Sheean, when the \$95,000.00 of stock was issued in June of 1906, \$47,500.00 to Marvin Hughitt, trustee; \$47,500.00 to A. J. Earling, trustee, those parties respectively held that stock as trustees for the Omaha and Milwaukee roads?

Mr. Sheean: That is my understanding of the facts.

Mr. Morley: And the two railroad companies were the actual owners?

Mr. Sheean: Yes, sir.

Mr. Morley: We offer plaintiff's Exhibit "O," being a resolution adopted from the minutes of the directors of the Omaha Railway, held December 9th, 1913, authorizing the Omaha to advance to the Minneapolis Eastern \$50,000.00 and accept bonds.

The Court: Received without objection.

Mr. Sheean: My understanding is that the Minneapolis Eastern bought one hundred thousand dollars' worth of property and it borrowed this fifty thousand dollars from the Omaha.

231 Mr. Morley: And fifty thousand from the Milwaukee?

Mr. Sheean: Yes, and afterwards repaid the money so borrowed by the issuance of bonds.

Mr. Morley: Fifty thousand to the Milwaukee and fifty thousand to the Omaha, that is my understanding.

Plaintiff rests.

Mr. Sheean: Defendants rest.

Testimony closed.

And the said Railway Companies, to-wit: the Minneapolis Eastern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the defendants herein, on the face of the record in the oral and written arguments and in the minutes of the court,

did allege and contend, among other things, that the order of the Commission in the premises, if sustained, would contravene and deny to the said Railway Companies the protection of the following constitutional guarantees:

Paragraph 7 of Article I of the Constitution of the State of Minnesota, which provides that no person shall be deprived of life, liberty or property without due process of law.

Paragraph 2 of Article I of the Constitution of the State of Minnesota, which provides that no law shall be passed impairing the obligations of contracts.

232 Paragraph 13 of Article I of the Constitution of the State of Minnesota, which provides that private property shall not be taken for public use without just compensation.

Paragraph 8 of Article I of the Constitution of the United States (and the statutes of the United States enacted thereunder and pursuant thereto), which provides that Congress shall have power to regulate commerce with foreign nations and among the several states.

Paragraph 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts.

Paragraph 1 of Article XIV of the amendments to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law.

Article V of the amendments to the Constitution of the United States, providing that private property shall not be taken for public use without just compensation.

Description of Exhibits.

Exhibit A:

Petition to the Railroad & Warehouse Commission, asking for relief against imposition of switching charge.

[Folios 233 and 234 missing.]

235 Exhibit B:

Articles of Incorporation of the Minneapolis Eastern Railway Company.

Exhibit C:

Minutes of Board of Directors' meeting held October 25, 1878, which was the meeting of the Directors last prior to the acquisition of the capital stock of the Minneapolis Eastern Railway Company by the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Exhibit D:

Contract between the Minneapolis Eastern Railway Company, Chicago, Milwaukee & St. Paul Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company, and supplement. Original contract dated October 25, 1878. Supplement dated September 20, 1878.

Exhibit E:

Minutes of meeting at which amendments to the Articles of Incorporation of the Minneapolis Eastern Railway Company were adopted.

Exhibit F:

Minutes of meeting of the Board of Directors of June 20, 1882, showing list of stockholders and number of shares held by each. Stockholders' meeting June 20, 1882, ratifying all acts of the corporation.

236 Exhibit G:

Chicago, Milwaukee & St. Paul Railway Company's Directors' meeting of August 9, 1880, ratifying agreements Exhibit D.

Exhibit H:

By-laws of the Minneapolis Eastern Railway Company.

Exhibit I:

Minutes of meetings at which any amendments to the by-laws of the Minneapolis Eastern Railway Company were passed.

Exhibit J:

Extract from minutes of Directors' meeting of the Minneapolis Eastern Railway Company, June 13, 1906, at which additional capital stock was authorized.

Exhibit K:

Resolution of Directors of Chicago, St. Paul, Minneapolis & Omaha Railway Company, October 16, 1908, regarding reissue of bonds and guaranty thereof.

Exhibits M, Nos. 1 and 2:

Maps of Minneapolis Eastern Railway Company's property.

Exhibit No. 3:

Statement of contracts executed by the Minneapolis Eastern Railway Company in its own name.

Exhibit No. 4:

Samples of blanks used by the Minneapolis Eastern Railway Company.

237 Exhibit No. 5:

Itemized statement of cost of reproduction of the Minneapolis Eastern Railway.

Exhibit No. 6:

Minneapolis Eastern Railway Company's statement of results of operation.

Exhibit No. 6a:

Statement of flour shipments from the Minneapolis Eastern to various roads in Minneapolis, July 1, 1914, to June 30, 1915.

Exhibit No. 7:

Extract from minutes of Directors' meeting of the Minneapolis Eastern Railway Company, June 28, 1905.

Exhibit No. 8:

Transcript of testimony before the Railroad & Warehouse Commission.

Exhibit No. 9:

Local tariff showing switching charges in Minneapolis.

Exhibit N:

Extracts of minutes of meetings at which mortgage bonds were authorized.

Exhibit O:

Resolution of C. St. P. M. & O. Ry. Co. December 9, 1913, authorizing advance to the Minneapolis Eastern Railway Company of \$50,000 to buy land, and to accept bonds as security.

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(Title of Cause.)

Proposed Case.

Now come the Minneapolis Eastern Railway Company, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, and hereby propose the settled case in the above entitled proceeding.

The proposed settled case consists of typewritten pages numbered 1 to 131, inclusive, including Exhibits "A," "B," "C," "D" and "E" to "I," inclusive, and also Exhibits numbered 1, 2, 3, 4, 5, 6 and 6-a and including plat "M," and including also Exhibits 7, 8, 9, N and O.

Dated February 14th, 1916.

W. H. NORRIS,

Attorney for Minneapolis Eastern Railway Company;

J. B. SHEEAN,

G. W. PETERSON,

Attorneys for C., St. P., M. & O. Ry. Co.;

F. W. ROOT,

O. W. DYNES,

Attorneys for C., M., & St. P. Ry. Co.,

Appellants.

To Lyndon A. Smith, Attorney General of Minnesota, and Frank J. Morley, Attorney for Complainant, Minneapolis, Minnesota, Attorneys for Respondents.

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(Title of Cause.)

Stipulation.

It is hereby stipulated, By and between the parties hereto that the foregoing transcript, consisting of pages 1 to 131, inclusive, and including Exhibits "A" to "K," inclusive, and Exhibits 1 to 6, inclusive; also "6a," Plat "M," and Exhibits 7, 8, 9, "N" and "O," having been found conformable to the truth, constitutes the record in said proceedings and the whole thereof, and the Court may make its Order that the same constitutes and is the settled case.

LYNDON A. SMITH,

Attorney General,

FRANK J. MORLEY,

Attorneys for Complainant.

J. B. SHEEAN &

GEO. W. PETERSON,

Attorneys for C., St. P., M. & O. Ry. Co.

F. W. ROOT,

Attorney for C., M. & St. P. Ry. Co.

W. H. NORRIS,

Attorney for Minneapolis Eastern Ry. Co.

Dated, February 25, A. D. 1916.

Order Settling Case.

I hereby certify that the foregoing case, consisting of 131 pages of typewritten matter, and in addition thereto, Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "3," "5," "6," "6a," "7," "8," "9," "N," and "O," attached hereto and Exhibits "T," "2," "4," and "M," filed herewith and identified by my signature thereon has been examined by me and found conformable to the truth and to contain all the evidence offered or introduced on the trial of this case, and all objections, rulings, orders, and all other proceedings of such trial; and I hereby settle and allow the same as the settled case herein.

By the Court.

W. C. LEARY, *Judge.*

(Title of Cause.)

The above entitled matter being regularly upon the general term calendar for September, 1915, came on for trial before the undersigned, one of the Judges of said Court, without a jury, and was

heard upon the 14th and 15th days of September, 1915, and was duly argued thereafter upon the 30th day of September, 1915.

Messrs. Lyndon A. Smith, Attorney General, and Frank J. Morley appeared as attorneys for the complainant, and Mr. J. B. Sheehan appeared as attorney for the defendant the Chicago, St. Paul, Minneapolis & Omaha Ry. Co.; Messrs. O. W. Dynes and F. W. Root appeared as attorneys for the defendant the Chicago, Milwaukee & St. Paul Ry. Co., and W. H. Norris, Esq., appeared as attorney for the defendant the Minneapolis Eastern Ry. Co.; this matter being an appeal from an order made by the Railroad & Warehouse
241 Commission of the state of Minnesota upon the 8th day of January, 1915.

The Court having heard all the evidence adduced by the respective parties and having listened to the arguments of Counsel and being fully advised in the premises, makes the following

Findings of Fact.

1. That the Minneapolis Civic & Commerce Association is a corporation duly organized under the laws of the state of Minnesota, and has as its object and purpose the general betterment of civic, commercial and industrial conditions in the city of Minneapolis, and the territory thereof and adjacent thereto.

2. That the Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation organized under the laws of the state of Wisconsin, and operates as a common carrier 1,672.71 miles of railroad, of which 431.72 miles are within the state of Minnesota, and that it has important and extensive terminals within the city of Minneapolis.

3. That the Chicago, Milwaukee & St. Paul Railway Company is a corporation organized under the laws of the state of Wisconsin and operates as a common carrier 9,373.31 miles of railroad of which 1,241.75 miles are within the state of Minnesota, and that it has important and extensive terminals within the city of Minneapolis.

4. That the Minneapolis Eastern Railway Company is a corporation organized under the laws of the state of Minnesota in
242 1878 and that its articles of incorporation were, on the 27th day of January, 1879, amended so that the general nature of its business was "the building and operating a railway from the city of Minneapolis in the county of Hennepin, and State of Minnesota, to the city of St. Paul, in the county of Ramsey, in said state, with branches connecting with any and all railroads now built or hereafter to be built or secured or constructed to or into the said cities or either of them; also branches to mills and manufactories in said cities or either of them; the said railway and branches to be constructed and operated with one or more tracks and with all necessary side tracks, turnouts and connections, and all necessary roadway, rights of way, depot grounds, yards, machine shops, warehouse elevators, depots, station houses, structures, buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway." Said railroad

claims to own 5.13 miles of railroad and actually operates but 2.03 miles thereof, of which 1.07 is main line track and 1.56 miles is yard track and sidings. The balance of 2.10 miles is located on the East side of the Mississippi river and now is operated by the Great Northern Railway Company and said Eastern Company in addition to this mileage has leased and operates .56 miles of trackage. The company was organized by the millers of Minneapolis and all of the members of the first board of directors were engaged in the milling business, but shortly after its organization the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company became the owners thereof by each acquiring one-half of its capital stock, then issued in the amount of thirty thousand dollars and said railway companies then furnished the means for building said road and acquired said stock before the said Eastern Company began operating its said road. That aside from a dividend of \$10,010.48 paid for the year 1905 the company paid no dividends on its stock from 1882 to 1906, but invested its surplus, amounting to \$95,000, in improvements and additions, and in 1906 it capitalized these investments and the stock then issued was equally divided between its stockholders.

The original issue of 7% first mortgage bonds in the sum of \$150,000.00 was guaranteed by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Chicago, Milwaukee & St. Paul Railway Company, and these were refunded by the issue of 4½% bonds in the same amount on January 1st, 1909, of which \$75,000.00 is owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and \$75,000.00 by the Chicago, Milwaukee & St. Paul Railway Company. Interest upon the bonds is paid regularly to the railroad companies.

5. That the Minneapolis Eastern Railway Company serves numerous large industries which are located upon its tracks, and that the receiving and delivering of line haul cars to and from the Chicago, St. Paul, Minneapolis & Omaha Railway Company and

244 Chicago, Milwaukee & St. Paul Railway Company is of great advantage to said companies, as it enables them to control important traffic to and from mills and elevators. That the following named industries are located upon the tracks of the said railway: Barber Milling Company, "Cataract Mill"; New Occidental Milling Company, "Occidental Mill"; Northwestern Consolidated Milling Company, "B" Mill, "C" Mill, "D" Mill "E" Mill, "H" Mill, "Excelsior Warehouse"; Pillsbury Flour Mills Company, "C" Warehouse, "B" Mill, "B" Elevator, "Palisade Mill"; Washburn Crosby Company, "D" Mill.

6. That the rate fixed in the tariff of the said Minneapolis Eastern Railway Company for handling inbound carloads of \$1.50 per car, and for outbound carloads ten cents per ton with a minimum of \$1.50 per car, and that grain is the principal inbound and flour the outbound shipment; that said company issues no billing upon freight and makes no direct charge against a shipper, except in a few cases.

7. That large mills and elevators in Minneapolis are also located

upon the tracks which are exclusively owned and controlled by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and by the Chicago, Milwaukee & St. Paul Railway Company, and that the service performed in handling cars to and from said mills and elevators is substantially the same as that which is performed in the handling of cars to and from the Minneapolis Eastern Railway Company; that the charge made by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, or Chicago, Milwaukee & St. Paul Railway Company for delivering a car of grain to a mill or elevator located upon the tracks of the Minneapolis Eastern Railway Company is \$1.50 per car in addition to the line rate from the point of origin, while there is no charge made by either company in addition to the line rate for delivering a car to a mill or elevator located upon the rails exclusively operated by the Chicago, St. Paul, Minneapolis & Omaha Railway Company or the Chicago, Milwaukee & St. Paul Railway Company.

8. That by its absorption tariff the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company absorb the switch charge made against all outbound carloads upon which it enjoys a line haul coming from the mills and elevators located upon the tracks of the Minneapolis Eastern Railway Company, where the freight charge is \$15.00 or over, and that from a practical standpoint shippers of inbound grain are the only persons who have to pay the charge of the Minneapolis Eastern Railway Company.

9. That the Minneapolis Eastern Railway Company is managed and operated by its board of directors, who are now and for a long period of time have been officers of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, and who receive their entire compensation from said railway companies. That the general control of said company is in charge of a managing committee, consisting of Mr. A. W. Trenholm General Manager of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Mr. J. H. Foster, General Superintendent of the Chicago, Milwaukee & St. Paul Railway Company. A superintendent is employed and he hires the switchmen, engine men, car repairers and other employees, and they are paid by the Minneapolis Eastern Railway Company. The company owns its own equipment and performs services for all railroads on equal terms.

10. That the said Minneapolis Eastern Railway Company files its annual reports and its tariff with the Interstate Commerce Commission and the Minnesota Railroad and Warehouse Commission as provided by law, and pays taxes to the state upon its gross earnings, and in said reports it claims to be a switching road and claims that the control by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company is direct.

11. That the tracks operated by the Minneapolis Eastern Railway Company are an important, convenient and necessary terminal facil-

ity for the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and that said companies do directly influence, control and operate said company.

12. That these foregoing findings of fact are in substance the findings of fact made by the Railroad & Warehouse Commission upon the hearing of this matter had before it and that they are
247 true and sustained by the evidence.

That as a conclusion from these facts the Court finds, as did the Commission, that the certain 1.07 miles of main line track and 1.56 miles of yard tracks and sidings, including ground and all railway facilities, which are operated by the Minneapolis Eastern Railway Company, is a part of the terminal property of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company; that it is the duty of said railway companies, and each of them, without charge to deliver to or receive from industries located upon said terminals, carload shipments upon which they, or each of them, receive a line haul; that the charge of \$1.50 per car on inbound grain which is delivered to mills and elevators located upon the rails now operated by the Minneapolis Eastern Railway Company gives an unlawful and unjust preference and advantage to mills and elevators located upon the rails which are exclusively owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company.

As

Conclusions of Law.

the Court finds:

1. That the order appealed from in this case is a lawful, reasonable and proper order of said Railroad and Warehouse Commission.

248 2. That the complainant and the state of Minnesota is entitled to judgment that the order appealed from be affirmed and for all things specified in said order, to-wit: that the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and the Minneapolis Eastern Railway Company, and each of them, cease and desist from charging \$1.50 per car for handling inbound shipments over the lines of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company and each of them, which are delivered by the Minneapolis Eastern Railway Company to mills or elevators located upon the tracks now operated by the same, or delivered by said company to connecting carriers, and that said Minneapolis Eastern Railway Company cease and desist from charging \$1.50 per car or any other sum for delivering carload shipments of freight moving from connecting carriers to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, or each of them, or from mills and elevators located upon the tracks now operated by said Minneapolis Eastern Railway Company to the said

Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, or each of them, and that said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and each of them, be, and the same are hereby required to operate
 249 said main track, yard track and sidings as a part of the terminal property of each of said railroads within the city of Minneapolis. This order shall apply only on intrastate shipments of freight, and shall take effect on the first day of February, A. D. 1915.

It is further ordered that the order staying the order of the said Railroad & Warehouse Commission herein dated February 8th, 1915, be continued in full force and effect until further order made herein.

Let judgment be entered accordingly.

By the Court,

W. C. LEARY, *Judge.*

Dated this 31st day of December, 1915.

Memorandum.

Section 4192 of the General Laws of 1913 in part and insofar as applicable to the findings of fact and order made by the Railroad & Warehouse Commission provides as follows: "Such findings of fact shall be prima facie evidence of the matters therein stated and the order shall be prima facie reasonable and the burden of proof upon all issues raised by the appeal shall be on the appellant."

The burden was therefore upon the appellant railway companies to overcome by the introduction of proper evidence the presumption raised by the findings of fact made by the Commission and to show that the order made by the Commission was not supported by the evidence or was either unlawful or unreasonable. The undisputed evidence shows that all the stock of the Eastern Railway Company was owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company in equal amounts. That of this stock a qualifying share was entrusted to each of the directors. It further to my mind seems to show that the general management was vested in its board of directors, but that its actual control and operation was vested in its managing directors, who at the present time are the General Manager of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the General Superintendent of the Chicago, Milwaukee & St. Paul Railway Company.
 250

These two officers serve without pay from the Eastern. Whatever salary is paid them is paid by the road of which they are the General Manager and the General Superintendent. They both testified they have never been approached directly or indirectly or influenced in the slightest degree by any officer or stockholder of either one of the two railroads which pay them their salary, but notwithstanding this fact, it is hard to conceive how they can divorce themselves in interest

from the companies paying them their salary, and to the management of which their time must be almost exclusively given. If the Omaha and the Milwaukee roads had wished actual control of a smaller railroad, how better could they do this than to put in actual control their General Manager and General Superintendent? Such

control could not be so adequately secured through minor
251 officers or stockholders or through their efforts to influence.

Who more thoroughly knows the needs and desires of these two roads than these two controlling officials?

It is conceded by the state as a general proposition of law that the fact that the stock of one railroad is owned by another does not make them one system. It is claimed by the appellant companies that ownership of stock and control such as is shown by the evidence herein does not constitute the Eastern a part of the Omaha and Milwaukee roads. As sustaining this contention they have cited several cases. I have taken particular pains to read all these cases and do not find they are in point with the facts in this case. I will not attempt to comment upon all the cases cited, but only upon those apparently most relied upon by the appellants.

In the case of *Senior v. New York City Railway Company* (97 N. Y. Supplement) there was stock control, but not complete ownership of stock and the roads were not managed by common officers. The court seemed to think that the minority stockholders of the 42nd Street road could have objected to the officers of that company carrying passengers over its road because they had paid a fare upon the defendant road, the Court saying "If orders had been given by the defendant corporation to the 42nd Street road to carry its passengers without payment of fare, the minority stockholders would
have had the right to object and hold the directors and officers
252 of the 42nd Street company to account for failing to perform their duties for the benefit of the 42nd Street Company."

In the *Pullman Palace Car Company v. Missouri Pacific Railway Company* (115 U. S. 587) a contract was made in 1877 by the appellant with the defendant by the terms of which the railway company was to haul appellant's cars on the passenger trains on its own line of road and on all roads which it now controls or may hereafter control by ownership, lease or otherwise. In 1880 the defendant company consolidated with itself certain other companies under the laws of Missouri, retaining its former name, and said consolidated company assumed all the obligations of the separate consolidating companies and continued to use and operate the former road together with other consolidated lines. The Court said: "This clearly contemplates the actual dissolution of the old corporations and the creation of a new one to take their place. The new company assuming on consolidations all the obligation of the old Missouri Pacific. This requires it to haul the Pullman cars under the contract on all roads owned or controlled by the old company at the time of the consolidation, but it does not extend the operation of the contract to other roads which the new company may afterward acquire. The power of the old company to get the control of other roads ceased when its corporate existence came to an end and the new company into which

its capital stock was merged by the consolidation undertook only to assume its obligations as they then stood. It did not bind itself to run the cars of the Pullman Company on all the roads it might from time to time itself control, but only on such as were controlled by the old Missouri Pacific. Contracts thereafter made to get control of other roads would be the contracts of the new consolidated company and not of those on the dissolution of which the company came into existence. It follows that the present Missouri Pacific Company is not required by the contract of the old company to haul Pullman cars on the road of the St. Louis, Iron Mountain & Southern Company even if it does now control that road within the meaning of the contract."

Clearly these two cases are not in point and decide different facts and apply principles of law applicable only to the special facts or contract there under consideration. The language from the last decision here commented upon cited by the appellants herein in their brief is in the nature of dicta because the Court had already decided the case upon the basis above indicated.

In the Peterson case (205 U. S. 364) the ownership of stock was largely in common, but not wholly so; the roads had common agents and employees, but such agents and employees were limited in authority to that exercised by ticket agents, general train masters and conductors and these were paid in proportion to the business done by each company. These conditions do not obtain in the present case.

254 In the Stickney case (215 U. S. 98) the question to be determined was the reasonableness of the terminal charge. The Interstate Commerce Commission had found that a terminal charge of \$2.00 per car for transporting livestock was excessive and should be reduced to \$1.00 per car. The Court does say: "The Union Stockyards Company is an independent corporation and the fact, if it be the fact, that most, or even all of its stock is owned by the several railroad companies entering into Chicago, does not make its lines or property part of the lines or property of the separate railroad companies," but a reading of the whole case makes it apparent that what the Court intended to do was to pass upon the reasonableness of the terminal charge. The Court considered that the question of ownership was immaterial, the syllabus reading as follows: "In determining whether the charge of the terminal company is or is not reasonable, the fact that connecting carriers own the stock of the terminal company is immaterial." The Court seems to hold that the charge for terminal service was reasonable and that if the total rate, including the terminal rate was excessive or unreasonable that the vice in the total charge was somewhere aside from the terminal rate and should have been amended where it was in fault. Ownership does not seem to have been considered as the test.

Bearing upon the question of control exercised by the Omaha and Milwaukee over the Eastern and supplementing the oral evidence elicited from the officials of the defendant companies, we have the contract which the Eastern entered into with the Omaha and the Milwaukee roads in 1878. I will not comment upon

its provisions, but simply say that in none of the cited cases has the Court had before it relations such as are disclosed by the evidence herein. It seems to me that the questions involved here in the determination of this matter are not disposed of by any of the cases cited by the appellants.

In addition to the findings of fact made by the Commission with reference to the ownership of stock and the control and operation of the Eastern, the Commission made its finding No. 7. This finding was prima facie evidence of the facts therein stated. It does not seem to me that the defendants have met this issue in such a way as to overthrow the prima facie showing of preference. On the whole, I believe that the findings made by the Commission herein are sustained by the evidence and that the order made by the Commission was reasonable and lawful.

In this memorandum I do not mean to say that the questions here involved are not close. I think they are close but the burden throughout was upon appellants and I do not think the prima facie case made by the state and complainant has been overthrown.

Knowing that this matter will be taken to the Supreme Court whichever way decided, and not being absolutely sure that I am right, I have continued the preliminary order of this Court made

February 8th, 1915, staying the operation of the order of 256 the Commission until further order made herein. I do this

feeling that an appeal will be seasonably taken by the defendant companies and that during the interim the shipper will not suffer if this order is complied with in its entirety. If the railway companies do not proceed in a seasonable manner, application may be made by the complainant for the vacation of this order.

Let this memorandum be made a part of the foregoing order.

W. C. LEARY, *Judge.*

Dated this 31st day of December, 1915.

Endorsed: Filed Jan. 3, 1916. P. S. Neilson, Clerk, by L. E. Petri, Deputy.

(Title of Cause.)

Judgment.

The above entitled action having been regularly placed upon the calendar of the above named Court for the September, A. D. 1915 General Term thereof, came on for trial before the Court on the 14th day of September, A. D. 1915, and the Court, after hearing the evidence adduced at said trial and being fully advised in the premises, did, on the 3rd day of January, A. D. 1916, duly make and file its findings and order for judgment herein.

257 Now, pursuant to said order and on motion of Messrs.

Lyndon A. Smith, Attorney General, and Frank J. Morley, Attorneys for Complainant, it is hereby adjudged and decreed:

1. That the order appealed from in this case is a lawful, reason-

able and proper order of the Railroad & Warehouse Commission of the State of Minnesota.

2. That the order herein appealed from be and is hereby affirmed in all things specified in said order, to-wit: That the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, and the Minneapolis Eastern Railway Company, and each of them, cease and desist from charging \$1.50 per car for hauling inbound shipments over the lines of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway and each of them, which are delivered by the Minneapolis Eastern Railway Company to mills or elevators located upon the tracks now operated by the same, or delivered by said company to connecting carriers, and that said Minneapolis Eastern Railway Company cease and desist from charging \$1.50 or any other sum, for delivering carload shipments of freight moving from connecting carriers to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, or each of them, or from mills and elevators located upon the tracks now operated by said Minneapolis Eastern Railway Company to the said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, or each of them, and that said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and each of them, be and the same are hereby required to operate said main track, yard track and sidings as a part of the terminal property of each of said railroads within the city of Minneapolis.

This order shall apply only on intrastate shipments of freight and shall take effect on the first day of February, A. D. 1915.

It is further adjudged and decreed that the order staying the order of the said Railroad & Warehouse Commission herein, dated February 8th, 1915, be continued in full force and effect until further orders made herein.

By the Court:

P. S. NEILSON,

Clerk of District Court.

B. K. WASMUTH, *Deputy.*

(Title of Cause.)

Notice of Appeal.

Please take notice, that the defendants in the above entitled action, appeal to the Supreme Court of Minnesota from that certain judgment entered in the above entitled action on the 13th day of March, 1916, and from the whole thereof.

Dated, March 15, 1916.

F. W. ROOT,

Attorney for Defendant C., M. & St. P. Ry. Co.

J. B. SHEEAN,

GEO. W. PETERSON,

Attorneys for Defendant C., St. P., M. & O. Ry. Co.

W. H. NORRIS,

Attorney for Defendant Minneapolis Eastern Ry. Co.

To Minneapolis Civic & Commerce Association, Complainant,
 Frank J. Morley, Esq., Attorney for Complainant, Hon. Lyndon A.
 Smith, Attorney General, Minnesota, P. S. Neilson, Esq., Clerk Dis-
 trict Court.

Due and personal service of the within notice of appeal admitted
 this 16th day of March, 1916.

W. H. NORRIS,
Attorney for Complainant,
Minneapolis C. & C. Ass'n.
 LYNDON A. SMITH,
Attorney General.
 P. S. NEILSON,
Clerk District Court.
 FRANK J. MORLEY,
Attorney for Complainant.

260 STATE OF MINNESOTA,
County of Hennepin:

In District Court, Fourth Judicial District.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Complainant,
 vs.
 CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
 St. Paul, Minneapolis & Omaha Railway Company, and Minne-
 apolis Eastern Railway Company, Defendants.

Stipulation.

It is hereby stipulated by and between the parties to the above en-
 titled action that the Bond on Appeal, in the said action, from the
 judgment of the district court of Hennepin County to the Supreme
 Court of Minnesota, may be, and the same hereby is, in all respects
 waived and the said defendants need not give the said Bond on
 Appeal.

Dated March 15, 1916.

FRANK J. MORLEY,
Attorney for Complainant.
 LYNDON A. SMITH,
Attorney General.
 F. W. ROOT,
Attorney for Defendant C., M. & St. P. Ry Co.
 J. B. SHEEHAN,
 G. W. PETERSON,
Attorneys for Defendant C., St. P., M. & O. Ry. Co.
 W. H. NORRIS,
Attorney for Defendant Minneapolis Eastern Ry. Co.

(Endorsed:) Filed Mar. 20, 1916. P. S. Neilson, Clerk, by L.
 S. Petri, Deputy.

201 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

I, P. S. Neilson, Clerk of the above named court, do hereby certify and return to the Supreme Court of the State of Minnesota, that I have compared the paper writing to which this certificate is attached with the original Notice of Appeal to Supreme Court, and Stipulation waiving Bond, in the action therein entitled, as the same appear of record and on file in the said clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof, and *pf* the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Minneapolis, in said County, this 21st day of March A. D. 1916.

[SEAL.]

P. S. NEILSON,
Clerk of District Court,
By C. U. WILLIAMSON, *Deputy.*

(Endorsed:) Filed Mar. 27, 1916. I. A. Caswell, Clerk.

262

(Title of Cause.)

Assignments of Error on Behalf of Chicago, Milwaukee and St. Paul Railway Company and Chicago, St. Paul Minneapolis & Omaha Railway Company.

(I) The court erred in its twelfth finding of fact herein, that 2.63 miles of the 5.13 miles of trackage now owned and operated by the Minneapolis Eastern Railway is a part of the terminal property of the St. Paul and Omaha Companies. (Folio 739, page 247.)

(II) The court erred in its twelfth finding of fact that it is the duty of the St. Paul and Omaha Companies, and each of them, without charge, to deliver or to receive from industries located upon the tracks of the Minneapolis Eastern Railway carload shipments upon which they or either of them receives a line haul, and that the charge of \$1.50 per car now imposed by the Minneapolis Eastern Railway, gives an unlawful and preferential advantage to industries located on the lines of either the St. Paul or Omaha Companies. (Folio 740, page 247.)

(III) The court erred in its second conclusion of law that the order appealed from was lawful and reasonable, and in refusing to find that said order was unlawful, without evidence to support it, beyond the power of the Commission to enter, and so arbitrary as to be beyond the exercise of a reasonable discretion. (Folio 741, page 247.)

(IV) The court erred in its second conclusion of law that the St. Paul and Omaha Companies, and each of them, be required to

operate a part of the property now owned and operated by the Minneapolis Eastern Railway. (Folio 744, page 248.)

263 (V) The court erred in its eleventh finding of fact that the St. Paul and Omaha Companies directly influence, control and operate the Minneapolis Eastern Railway Company, which finding is not supported by the evidence.

(VI) The court erred in affirming said order in that it arbitrarily and unreasonably deprived the St. Paul and Omaha Companies of the right to remove the alleged discrimination by assessing a charge of \$1.50 per car on cars delivered to or received from industries located on their tracks, or the tracks of either of them.

F. W. ROOT,
J. B. SHEEHAN,
Attorneys for Appellants.

(Endorsed:) Filed May 20, 1916. I. A. Caswell, Clerk.

264

(Title of Cause.)

Assignments of Errors.

The appellant, the Minneapolis Eastern Railway Company, contends that as against this company, the court below erred:

I. In holding the order appealed from to be lawful, reasonable and proper.

II. In rendering judgment sustaining and affirming that order.

And that in and by said holding and judgment that court further erred:

III. In denying to this appellant the protection of paragraph 7 of Article I of the Constitution of Minnesota, which ordains that no person shall be deprived of life, liberty or property, without due process of law.

IV. In denying to this appellant the protection of paragraph 13 of Article I of the Constitution of Minnesota, which ordains that private property shall not be taken, destroyed or damaged, for public use, without just compensation therefor, first paid or secured.

V. In denying to this appellant the protection of paragraph 1 of Article IV of the Amendments to the Constitution of the United States, which ordains that no state shall deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws; and

VI. In denying to this appellant the protection of Article V of the Amendments to the Constitution of the United States, which ordains that no person shall be deprived of life, liberty or property, without due process of law; and that private property shall not be taken for public use, without just compensation.

W. H. NORRIS,
*Attorney for Appellant Minneapolis
Eastern Railway Company.*

(Endorsed:) Filed May 23, 1916. I. A. Caswell, Clerk.

265 MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Respondent,
v.
C., M. & ST. P. RY. CO. et al., Appellants.

Syllabus.

1. Both the Railroad and Warehouse Commission and the trial court found as a fact that the Minneapolis Eastern Railway is one of the terminal facilities of the "Milwaukee" and "Omaha" railway systems at Minneapolis. Held that the fact that these companies furnished all the funds for constructing the Eastern and own all its capital stock and bonds, taken in connection with the restrictions imposed upon it by the contract under which it was constructed and the rights and powers secured to these companies by such contract and with the facts disclosed as to the manner in which it is managed, controlled and operated, is sufficient to sustain such finding.
2. Imposing charges for switching shipments of grain to industries located upon the tracks of the Eastern, no charge being made for switching like shipments to industries located upon other industrial tracks of the "Milwaukee" and "Omaha," is an unjust discrimination against the industries served by the tracks of the Eastern.
3. The charges for the line haul made by the "Milwaukee" and "Omaha" include the charge for switching to and from industries located upon their industrial tracks, and they cannot remove the discrimination against industries located upon the tracks of the Eastern by imposing an additional charge for switching over their other industrial tracks.

Affirmed.

Opinion.

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, designated in these proceedings as the "Omaha" and the Chicago, Milwaukee & St. Paul Railway Company, designated in these proceedings as the "Milwaukee" are Wisconsin corporations; and each operates an extensive railway system having important and extensive terminals in the city of Minneapolis. The Minneapolis Eastern Railway Company, designated herein as the "Eastern," is a Minnesota corporation and operates 2.63 miles of track as a switching railroad which serves several of the large flour mills in the city of Minneapolis. This company was organized in 1878 by the millers of Minneapolis, but, at the time of its organization or shortly thereafter, an arrangement was made by which the Omaha and Milwaukee companies, in equal amounts, provided the funds for constructing and equipping the road and took over

the capital stock and bonds thereof. The Eastern charges and collects \$1.50 per car for all inbound shipments handled by it, and 10 cents per ton, with a minimum charge of \$1.50 per car, for all outbound shipments handled by it; but neither the Milwaukee nor the Omaha make any charge for the terminal switching done by themselves where they have the "line haul."

Plaintiff filed a complaint with the Railroad & Warehouse Commission alleging that the Eastern is merely a part of the terminal facilities of the Milwaukee and Omaha companies, and that the charge for delivering shipments to industries situated upon the tracks of that company was an unlawful discrimination against such industries. After a hearing the Railroad & Warehouse Commission found the facts to be as claimed by plaintiff and made an order that the Milwaukee, the Omaha, and the Eastern companies, and each of them, "cease and desist from charging \$1.50 per car for handling inbound shipments over the lines of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company and each of them, which are delivered by the Minneapolis Eastern Railway Company to mills or elevators located upon the tracks now operated by the same, or delivered by said company to connecting carriers, and that said Minneapolis Eastern Railway Company cease and desist from charging \$1.50 per car or any other sum for delivering carload shipments of freight moving from connecting carriers to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, or each of them, or from mills and elevators located upon the tracks now operated by said Minneapolis Eastern Railway Company to the said Chicago, St. Paul, Minneapolis & Omaha Railway Co. and Chicago, Milwaukee & St. Paul Railway Company, or each of them, and that said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and each of them, be, and the same are hereby required to operate said main track, yard track and sidings as a part of the terminal property of each of said railroads within the city of Minneapolis. This order shall apply only on intrastate shipments of freight, and shall take effect on the first day of February, A. D. 1915."

The companies appealed from this order. The district court tried the cause anew and made findings and rendered judgment substantially the same as the findings and order made by the commission. The companies appealed therefrom to this court.

The Milwaukee and Omaha companies and, so far as disclosed, all other railways entering Minneapolis deliver and accept freight, shipped over their respective lines, at any industry reached by their own rails without making any charge for switching to or from such industry. The expense for such service is covered by the charge for the "line haul." Both the Milwaukee and the Omaha "absorb" the charges of the Eastern for switching and delivering inbound shipments of commodities other than grain, and outbound shipments of all kinds in all cases where they receive \$15 or more per car for the

line haul; but charge and collect \$1.50 per car, in addition to the charge for the line haul, for all inbound shipments of grain switched and delivered by the Eastern. In other words, it costs \$1.50 more per car to deliver grain to an elevator or mill located upon the Eastern than to an elevator or mill located upon any industrial track of either company regardless of the distance the shipment is transported in the switching operation. If the Eastern is merely a terminal facility of these companies,—in other words one of their industrial tracks—this charge operates as a discrimination against the mills and elevators located upon that line. Officers of the companies testified that they made deliveries without charge for switching to all industries reached by their own rails and would have made deliveries without charge to all industries reached by the Eastern if they had owned the tracks of that company. Consequently the pivotal question is whether the finding of both the commission and the trial court that the Eastern in fact constitutes a part of the terminal facilities of the Milwaukee and the Omaha and is operated as such is sustained by the evidence.

The companies contend that the Eastern is a separate legal entity which transacts its own business and operates its own line wholly independent of the Milwaukee and Omaha; that the fact that these two companies own all its capital stock places them in no different position from that of any other stockholder; and that services rendered by the Eastern should be treated as services rendered by a company entirely separate and distinct from the holding companies.

The situation and effect resulting from the ownership by one railway company of the capital stock of another was explained in *State v. C. & N. W. Ry. Co.*, not yet reported, sufficiently to make further explanation thereof unnecessary herein.

The "Eastern" was incorporated in June, 1878. The articles of incorporation fixed the capital stock at 10,000 shares, provided for a board of nine directors, and named the nine who constituted the first board. On October 25, 1878, and before it possessed any funds or had begun the construction of its road, the "Eastern" as party of the first part, the "Milwaukee" as party of the second part, and the company which, so far as here material, is now the "Omaha" as party of the third part, entered into a contract which, among other things, provided that only 300 shares of the capital stock of the Eastern should be issued during the continuance of the contract, of which 145 shares were to be issued to a trustee, 1 share to each of five directors of the company residing at Minneapolis and their successors in office, 75 shares to the "Milwaukee" or to persons designated by that company, and 75 shares to the "Omaha" or to persons designated by that company; that the 145 shares issued to the trustee and the 5 shares issued to the directors should not be transferrable except by the written consent of all three companies and that any transfer thereof without such consent should be void; that "on or before the first day of December next the Board of Directors of the said party of the first part shall cause two persons to be named by the party of the second part and two persons to be named by the

party of the third part, to be elected into said Board, as directors, and shall cause the necessary vacancies to be made in the said Board for that purpose;" that the "Eastern" should forthwith locate the line of its railroad as therein specified, procure the right of way therefor, and commence and complete the construction thereof as soon as possible; and that the Eastern should issue its bond in the sum of \$150,000 secured by a trust deed of its property. This contract also contained these further provisions which we quote in full: "In consideration of the premises the said parties of the second and third parts agree to purchase as many of said bonds at the rate of eighty per cent of their par value as may be necessary to furnish a fund sufficient to pay for the right of way, construct and complete said railway within the termini above mentioned and to equip the same ready for business, each of the said second and third parties taking and paying for an equal amount thereof to be paid for from 269 time to time as required by the party of the first part to pay for said right of way and the construction and equipment of said railway.

It is mutually agreed that the said second and third parties are to have equal and the same rights in and to the said railway of the party of the first part in all respects, that they are to pay the same price for switching and handling their respective cars on said railway and that no partiality or favor is to be shown or extended to one of the said parties over the other and that the business of each is to be transacted with equal promptness and dispatch, and it is further agreed that the superintendent, or person having charge of the operation thereof shall be appointed by the consent and mutual agreement of all the parties to these presents.

The said party of the first part shall charge all persons and parties for switching loaded cars either in or out over said track, the sum of one dollar for each loaded car. But in consideration that the parties of the second and third part shall have advanced the money necessary to build and complete said railway a rebate of fifty per cent of said charge shall be made to each of said second and third parties on their business on said railway.

In case any other railroad company having equal facilities of access to the mills at Minneapolis with the railway of the party of the first part shall promptly and satisfactorily do the switching for said second and third parties hereto, to said mills over its said railroad, then and in that case the said party of the first part with the written consent of the said second and third parties, will do switching for such railroad company over the said railway of the party of the first part on the same terms that switching for the said second and third parties is done over such other railroad, but in such case the price for switching to be charged and collected by said party of the first part shall be uniform as to all and without rebate to any person or company."

The road was constructed, equipped and put into operation under and pursuant to this contract. By a subsequent arrangement the Milwaukee and Omaha companies became the owners of all the capital stock issued by the Eastern, each owning one-half thereof.

Although each of the nine directors holds one qualifying share, such shares in fact belong to one or the other of these companies. Four of the directors are officers of the Omaha; three of the others are officers of the Milwaukee; another is the attorney of the Eastern and was formerly an attorney of the Milwaukee; the other, a banker of Minneapolis, is president of the Eastern, and was intended as a sort of umpire between the Omaha and the Milwaukee interests and is not affiliated with either of those companies. The duties of the board of directors appear to be little more than nominal, however, for by a by-law "the management and control of all operations of the company" is placed in the hands of a managing committee of two members elected by the directors. For many years the general superintendent of the Milwaukee and the general manager of the Omaha have constituted this managing committee, and have controlled, managed and operated the Eastern without interference by either the Milwaukee, the Omaha, or its own board of directors. Neither the president nor the directors receive any compensation. The members of the managing committee receive no compensation from the Eastern, and no additional compensation from their own companies for services performed for the Eastern. Under and subject to the managing committee is a superintendent who hires and discharges employees and has active charge of the operation of the road. The company has its own tracks and equipment which it operates by its own employees, and it serves all the nine railroads entering Minneapolis upon the same terms. Its tracks connect with those of the Milwaukee, of the Great Northern, and of the Railway Transfer. Railways having no direct connection with it make connection over one or the other of those lines. It neither issues nor receives waybills but transfers cars to and from the various industries on its lines upon switching cards. It collects its charges for switching from the railway delivering or receiving the shipment except in the few cases where cars are transferred from one industry to another or some like service is performed. It files its tariffs with the Interstate Commerce Commission and with the State Railroad & Warehouse Commission, makes the customary reports to both these commissions, and pays a gross earnings tax to the state and a corporation tax to the United States. It makes its own contracts, collects its own revenues and pays its own bills. Its charges, considered by themselves independent of the line haul, are found and are conceded to be reasonable for the service rendered.

Plaintiff contends that the Milwaukee and Omaha companies control the management and operation of the Eastern not only through the ownership of its stock but by means of the rights and powers secured to them by the contract under which its railroad was constructed and has since been operated, and that they in fact operate it as one of their industrial tracks. By this contract these companies obligated the Eastern to issue no more than 300 of its 10,000 shares of capital stock; to make no disposition of 150 of such 300 shares without the consent of both of them; to elect as directors two persons named by the Milwaukee and two persons named by the Omaha; to locate and construct its road along the route and between the

271 terminals therein specified; to issue its bonds in the sum of \$150,000 secured by a mortgage upon all its property, which bonds the companies were to purchase at eighty per cent of their par value; to give these companies "equal and the same rights in and to the said railway"; to put a person mutually agreed upon by the three companies in charge of the operation of the road; to charge a specified rate for switching; and to give these companies a rebate of fifty per cent of the prescribed charge. The contract further provided that in case any other railroad should have facilities for switching to the mills equal to those of the Eastern and should promptly and satisfactorily do such switching for the Milwaukee and Omaha then and in that event the Eastern with the written consent of the Milwaukee and Omaha should do switching for such other company on the same terms that such other company did switching for the Milwaukee and Omaha; and that in such case the charges of the Eastern should "be uniform as to all and without rebate to any person or company."

The rates for switching prescribed in the contract have since been advanced and the provisions for rebates is no longer effective, but the contract clothed the trunk lines with rights and powers much more extensive than those usually possessed by a mere owner of capital stock. By prohibiting the Eastern from issuing more than 300 of its 10,000 shares of capital stock, and by providing for the issuance by it and the purchase by themselves of a prescribed amount of bonds secured by a mortgage upon all its property, the trunk lines seriously curtailed the power of the Eastern to finance its undertaking in any other manner than through themselves. Financial dependence would be a natural result of such arrangement, and in fact the Eastern has received no funds, other than its earnings, from any other source. The trunk lines also stipulated that each should have an equal voice with the Eastern in selecting the person who should take charge of and operate its road. For some years the general manager of one and the general superintendent of the other, acting together, have had the full and exclusive control and management of the business and affairs of the Eastern, and have operated it through a superintendent selected by themselves and subject to their orders.

272 The contract also fixed the charges to be made by the Eastern and thereby gave the trunk lines power to control any changes in such charges except as such power has been limited by statute. The provision specifying the conditions under which the Eastern should do switching for other railways whose rails reached the mills implies that it was to perform such services only when authorized by the trunk lines, and that the trunk lines expected to control its action in that respect and to use it as a means of making satisfactory arrangements with such other railways. Although statutes enacted since the making of the contract may have deprived this provision of much of its potency, it tends to show that the parties contemplated that the Eastern should be used as an instrumentality for furthering the interests of the trunk lines.

While the ownership of the capital stock would not be sufficient in and of itself to support the findings of the trial court, we think

that fact coupled with the other facts disclosed by the record are sufficient to sustain such findings. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310. As said in the case cited, "the record does not present a case of stock ownership merely, or of a holding company which was content to hold"; but a case where the power to control the operation of another company has been secured and is being exercised. The trunk lines already "absorb" the charges of the Eastern for handling outbound shipments in all cases where no charge would be made for handling such shipments if handled upon other industrial tracks belonging to them, and also "absorb" the charges of the Eastern for handling inbound shipments of all commodities other than grain where no charge would be made for handling such shipments if handled upon such other industrial tracks; and the practical effect of the order is to require them to extend their "absorption" so as also to take in the charges of the Eastern for handling shipments of inbound grain.

273 The companies contend that, if the Eastern be held to be one of the terminal facilities of the trunk lines, and if charging for delivering grain thereover without charging for making such deliveries over their other industrial tracks is an unlawful discrimination, they have the right at their option to remove such discrimination either by abolishing the charges for deliveries over the Eastern or by collecting like charges for deliveries over such other tracks; and that the court erred in not according them such option. This position is untenable. The charges for the services rendered by means of the terminal facilities of the trunk lines are embodied in and covered by the charges for the line haul, and are provided for by the tariffs of the respective companies. *Interstate Commerce Commission v. A. T. & S. F. Ry. Co.*, 234 U. S. 294. The case of *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340, 59 L. Ed. 1337, did not involve these questions and is not in point.

Judgment affirmed.

TAYLOR, C.

(Endorsed:) Filed July 21, 1916. I. A. Caswell, Clerk.

274 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1916.

No. 10.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Respondent,
vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
St. Paul, Minneapolis & Omaha Railway Company, and Minneapolis Eastern Railway Company, Appellants.

Pursuant to an order of Court duly made and entered in this

cause July 21 A. D. 1916 it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Fourth Judicial District, sitting within and for the County of Hennepin be and the same hereby is in all things affirmed. And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellants herein the sum and amount of Seventy-two and 40/100 dollars, (\$72.40) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed August 23, A. D. 1916.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs \$25.00; Printer \$47.40; Clerk \$—; Acknowledgments \$—; Return \$—; Postage and Express \$—; Filing Mandate \$—. Total \$72.40.

275 STATE OF MINNESOTA, ss:

Supreme Court.

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul August 23, A. D. 1916.

[SEAL.]

I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment. Filed August 23 A. D. 1916. I. A. Caswell, Clerk.

276 No. 19878. State of Minnesota, Supreme Court. Minneapolis Civic & Commerce Association, Respondent, vs. Chicago, Milwaukee & St. Paul Railway Company, et al., Appellants. Judgment Roll. Filed August 23, 1916. I. A. Caswell, Clerk.

277 STATE OF MINNESOTA, ss:

Supreme Court.

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Minneapolis Civic & Commerce Association, Respondent, vs. Chicago, Milwaukee & St. Paul Ry. Co., et al., Appellants, and also of the opinion of the court rendered therein to-

gether with the assignments of errors, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 7th day of September.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

278 In the Supreme Court of the United States.

MINNEAPOLIS EASTERN RAILWAY COMPANY, CHICAGO, ST. PAUL,
Minneapolis & Omaha Railway Company, and Chicago, Mil-
waukee & St. Paul Railway Company, Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Defendant in Error.

Assignment of Errors.

Now come the Minneapolis Eastern Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, plaintiffs in error, and jointly and severally, make the following assignment of errors which occurred in the hearing and determination of said cause in said Supreme Court, towit:

I.

That said Supreme Court erred in holding that the judgment of the trial court, affirming the order of the Railroad & Warehouse Commission of the State of Minnesota finding the property of the Minneapolis Eastern Railway Company to be the property of the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, was not a confiscation of the property of the Minneapolis Eastern Railway Company and a deprivation of its property, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States.

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II.

That said Supreme Court erred in refusing to hold that the order of the Railroad & Warehouse Commission, if enforced, would deprive said plaintiffs in error and each of them of their property without compensation and without due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

III.

That said Supreme Court erred in refusing to hold that said order was unreasonable and unlawful in compelling the Chicago, Mil-

waukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company to operate the tracks of the Minneapolis Eastern Railway Company without compensation and without due process of law and contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States.

IV.

That said Supreme Court erred in refusing to hold that said order was unreasonable and unlawful in that it deprived the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company of the right to remove the alleged discrimination by imposing like charges on traffic delivered to and received from industries located on the tracks of each of said last named plaintiffs in error, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States.

V.

The order of the Railroad & Warehouse Commission of the State of Minnesota appealed from in this case imposes an unjust
280 burden upon Interstate Commerce and discriminates against Interstate Commerce and in favor of State commerce in violation of Paragraph 3 of Section 8 of Article 1 of the Constitution of the United States, and the Supreme Court of the State of Minnesota erred in refusing to set aside said order of the Railroad & Warehouse Commission of the State of Minnesota and in entering a judgment sustaining and affirming said order.

VI.

The order of the Railroad & Warehouse Commission of the State of Minnesota appealed from in this case imposes an unjust burden upon Interstate commerce and discriminates against Interstate commerce in favor of State commerce in contravention of an act entitled An Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof, and is more particularly in contravention of Sections 1, 2, 3, 6, 13 and 15, thereof, as amended and the Supreme Court of the State of Minnesota erred in refusing to set aside the order of the Railroad & Warehouse Commission of the State of Minnesota and in entering a judgment sustaining and affirming said order.

VII.

The order of the Railroad & Warehouse Commission of the State of Minnesota involved herein, relieves shippers of freight moving intrastate over the lines of the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, destined to or from industries located on the rails of the Minneapolis Eastern Railway Company of the obligation

of paying said Minneapolis Eastern Railway Company the whole or any part of the just and reasonable charges that it is permitted to charge and does charge interstate shippers under the laws of the United States for indentially the same character, kind and quantity of service, and the Supreme Court of the State of Minnesota erred in entering a judgment sustaining, affirming and giving effect to said order of said Railroad & Warehouse Commission.

VIII.

The Railroad & Warehouse Commission of the State of Minnesota having expressly found and entered its finding of record that no testimony was presented at the hearing before that body which challenged the reasonableness of the charge of \$1.50 per car made by the Minneapolis Eastern Railway Company and having dismissed the petition in so far as it complained against the reasonableness of such charge, the order of said Commission directing the discontinuance of said charge has the effect of taking the property of the defendants before said Commission, without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and the Supreme Court of the State of Minnesota erred in entering its judgment sustaining, affirming and giving effect to said order of said Commission.

IX.

The order of the Railroad & Warehouse Commission of the State of Minnesota appealed from, deprives the Minneapolis Eastern Railway Company of its contractual rights secured by charter granted by the State of Minnesota, to collect and receive reasonable compensation for its transportation services and has the effect of impairing the obligations of its charter contract in violation of Section 10, of Article 1 of the Constitution of the United States, and the Supreme Court of the State of Minnesota erred in affirming, sustaining and giving effect to said order.

X.

The order of the Railroad & Warehouse Commission of the State of Minnesota appealed from, deprives the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company of their contractual rights as stockholders of the Minneapolis Eastern Railway Company, to derive reasonable and lawful benefits from the lawful earnings of said company and has the effect of impairing the obligations of the contract existing between said Companies in violation of Section 10 of Article 1 of the Constitution of the United States, and the Supreme Court erred in affirming, sustaining and giving effect to said order.

XI.

The order of the Railroad & Warehouse Commission of the State of Minnesota appealed from, in so far as it assumes to direct and

compel the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, and each of them, to operate the main line, yard tracks and sidings of the Minneapolis Eastern Railway Company as a part of the terminal property of each of said railroad companies within the city of Minneapolis has the effect of compelling one railroad that is engaged in the business of an interstate common carrier subject to the Act to Regulate Commerce to turn over its tracks and terminal facilities to other railroads for the performance by them of the same transportation business in contravention of Section 15 of an act of the Federal Congress entitled An Act to Regulate Commerce, as amended, and the Supreme Court of the State of Minnesota
 283 erred in affirming, sustaining and giving effect to that portion of said order.

XII.

That the finding of the Railroad & Warehouse Commission and of the District Court of the State of Minnesota that it is an unlawful and unjust preference and advantage to industries located on rails owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and by the Chicago, Milwaukee & St. Paul Railway Company for those Companies to charge more for making deliveries in the city of Minneapolis to points on the rails of the Minneapolis Eastern Railway Company than they respectively charge for making deliveries to points on their own respective rails is not authorized by law and the judgment of said District Court directing the discontinuance of higher charges for deliveries made to industries located on the rails of the Minneapolis Eastern Railway Company constitutes an unlawful assumption of a power with which said District Court was not clothed and has the effect of taking property of the said Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company without due process of law in contravention of Section 1, of Article XIV of the amendments to the constitution of the United States, and the Supreme Court of the State of Minnesota erred in affirming, sustaining and giving effect to said judgment.

XIII.

That said Supreme Court erred in not reversing the order of the trial court with instructions to such court to reverse the order of the Railroad & Warehouse Commission, and in denying to the plaintiffs in error and each of them, their rights under Section 1 of Article XIV of the amendments to the constitution of the United States and
 284 Sections 8 and Section 10 of Article 1 of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing, plaintiffs in error, jointly and severally, pray that the judgment of the said Supreme Court of the State of Minnesota be reversed and set

aside and held for naught, and that judgment be rendered for said plaintiffs in error granting to them their rights under the constitution and statutes of the United States, and for judgment for their costs.

W. H. NORRIS,
J. B. SHEEAN,
O. W. DYNES &
F. W. ROOT,

Attorneys for Plaintiffs in Error.

284½ [Endorsed:] 19878. In the Supreme Court of the United States. M. E. Ry. Co., C. St. P. M. & O. Ry. Co. and C. M. & St. P. Ry. Co., Plaintiffs in Error vs. M. C. & C. Ass'n, Defendant in Error. Assignments of error. Filed Aug. 23, 1916. I. A. Caswell, clerk.

285 In the Supreme Court of the State of Minnesota.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Respondent,

VS.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, St. Paul, Minneapolis & Omaha Railway Company, and the Minneapolis Eastern Railway Company, Appellants.

Petition for Writ of Error.

To the Honorable Justice of the Supreme Court of the State of Minnesota:

Your petitioners, the above named Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Minneapolis Eastern Railway Company, jointly and severally, respectfully state that on the 21st day of July, 1916, the Supreme Court of the State of Minnesota rendered a final judgment against said petitioners in a certain case wherein said petitioners were defendants, and the Minneapolis Civic & Commerce Association was plaintiff, as will appear by reference to the record and proceedings in said case, and that the said court is the highest court of law or equity in said state in which a decision in said suit could be had; that in said suit it was contended in this court:

(1) That the order of the Railroad & Warehouse Commission and the judgment of the trial court affirming said order, finding and adjudging that a part of the property owned in fee, possessed and operated by the Minneapolis Eastern Railway Company was the property of the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company and directing that both of said last named companies operate the property so owned, possessed and operated by the Minneapolis Eastern Railway Company, would confiscate the property of said petitioners and each of them and would deprive them and each of them of their

286 property without due process of law contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States, and in consequence by such contention there was drawn in question therein and thereto, the application of said Section 1 of said Fourteenth Amendment.

(2) That said order of the Railroad & Warehouse Commission was unreasonable and unlawful in that it deprived the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company of the right to remove the alleged discrimination referred to in said order by imposing like charges on traffic delivered to and received from industries located on the tracks of each of said last named railroad companies contrary to Section 1 of said Fourteenth Amendment, and that the judgment of the trial court in affirming said order, deprived said railroad companies and each of them of their property without due process of law, and in consequence by such contention there was drawn in question therein and thereto, the application of said Section 1 of said Fourteenth Amendment.

(3) That said order and the judgment of the trial court affirming the same denied to the petitioners herein and each of them, the guarantees contained in Section 8 of Article 1 of the Constitution of the United States and the statutes of the United States enacted thereunder and pursuant thereto, providing that Congress shall have power to regulate commerce with foreign nations and among the several states; also of the guarantees contained in Section 10 of Article 1 of said Constitution and Section 1 of the Fourteenth Amendment of said Constitution, and that the decision of this court is against the rights claimed by said petitioners and each of them under said constitutional provisions, and as they and each of them believe contrary thereto and against the rights of said petitioners and each of them thereunder, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, said Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Minneapolis Eastern Railway Company, pray that a Writ of Error may issue to the Supreme Court of the State of Minnesota, for the correcting of the error complained of, and that a duly
287 authenticated transcript of the record, proceedings and papers therein may be sent to the United States Supreme Court.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

By O. W. DYNES &

F. W. ROOT,

Its Attorneys.

CHICAGO, ST. PAUL, MINNEAPOLIS
& OMAHA RAILWAY COMPANY,

By J. B. SHEEAN, *Its Attorney.*

MINNEAPOLIS EASTERN RAILWAY
COMPANY,

By W. H. NORRIS, *Its Attorney.*

288 In the Supreme Court of the State of Minnesota.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Respondent,
vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
St. Paul, Minneapolis & Omaha Railway Company, and the Min-
neapolis Eastern Railway Company, Appellants.

Order Allowing Writ of Error.

Come now the above named Chicago, Milwaukee & St. Paul Rail-
way Company, Chicago, St. Paul, Minneapolis & Omaha Railway
Company, and the Minneapolis Eastern Railway Company, appel-
lants named in the above entitled suit, on this 13 day of August,
1916, and file and present to this court their petition praying for al-
lowance of a Writ of Error intended to be urged by them and each
of them, and praying further that the duly authenticated transcript
of the record, proceedings and papers upon which the judgment
herein was rendered may be sent to the Supreme Court of the United
States, and that such other and further proceedings may be had in
the premises as may be just and proper; and upon consideration of
said petition this court desires to give petitioners an opportunity to
test in the Supreme Court of the United States the question herein
presented. It is ordered, that a Writ of Error be allowed as prayed,
provided, however, that said Chicago, Milwaukee & St. Paul Railway
Company, Chicago, St. Paul, Minneapolis & Omaha Railway Com-
pany and the Minneapolis Eastern Railway Company give bond ac-
cording to law in the sum of Thirty Thousand (\$30,000) Dollars,
which bond shall operate as a supersedeas bond.

In testimony whereof witness my hand this 13th day of August,
1916.

CALVIN L. BROWN,

*Chief Justice of the Supreme Court
of the State of Minnesota.*

288½ [Endorsed:] 19878. In the Supreme Court of Minnesota.
M. C. & C. Assn., Respondent, vs. C. M. & St. P. Ry. Co., C.
St. P. M. & O. Ry. Co., and M. E. Ry. Co., Appellants. Petition for
Writ of Error. Order Allowing Writ of Error. Filed Aug. 23,
1916. I. A. Caswell, Clerk.

289 In the Supreme Court of the United States.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Defendant in Error,
vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
St. Paul, Minneapolis & Omaha Railway Company, and the Min-
neapolis Eastern Railway Company, Plaintiffs in Error.

Bond.

Know all men by these presents, That we, Chicago, Milwaukee &

St. Paul Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, and the Minneapolis Eastern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, as principals, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto the Minneapolis Civic & Commerce Association in the sum of Thirty Thousand (\$30,000) Dollars to be paid to the said obligee, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by the presents.

Sealed with our seals and dated this 10th day of August, 1916.

Whereas, lately in the Supreme Court of the State of Minnesota in a suit pending in said court between the Minneapolis Civic & Commerce Association, plaintiff, and Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Minneapolis Eastern Railway Company, defendants, judgment was entered against said defendants, and said defendants and each of them seek to prosecute its writ of error 290 in the Supreme Court of the United States to reverse the judgment rendered in said suit.

Now therefore, the condition of this obligation is such that if the above named defendants, Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Minneapolis Eastern Railway Company, shall prosecute their said writs of error to effect and answer all costs and damages if they or either of them shall fail to make good their plea then this obligation shall be void, otherwise to remain in full force and effect.

[Seal C., M. & St. P. Ry. Co.]

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

(Signed) By E. S. KEELEY.

Attest:

(Signed) E. W. ADAMS, *Secretary*.

[Seal C., St. P., M. & O. Ry. Co.]

CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY,

(Signed) By JAMES F. CLARK.

Attest:

(Signed) C. A. LEGGO, *Ass't Secretary*.

[Seal M. E. Ry. Co.]

MINNEAPOLIS EASTERN RAILWAY
COMPANY,

(Signed) By F. A. CHAMBERLAIN.

Attest:

(Signed) J. H. FOSTER, *Secretary.*NATIONAL SURETY COM-
PANY,

[SEAL.]

(Signed) By W. C. McCURDY, *Its Attorney-in-fact.*STATE OF ILLINOIS,
County of Cook, ss:

On this 10th day of August, 1916, before me appeared E. S. Keeley, to me known, who being by me duly sworn did say that he is vice president of the Chicago, Milwaukee & St. Paul Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that the said instrument was executed in behalf of said corporation by authority of its Board of Directors, and that said E. S. Keeley acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and official seal the day and year first above written.

[NOTARIAL SEAL.] (Signed)

W. S. MILLARD,
Notary Public, Cook Co., Ill.

My commission Expires May 10, 1920.

291 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 9th day of August, 1916, before me appeared James T. Clark, to be known, who being by me duly sworn did say that he is president of the Chicago, St. Paul, Minneapolis & Omaha Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that the said instrument was executed in behalf of said corporation by authority of its Board of Directors, and that said James T. Clark acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and official seal the day and year first above written.

[NOTARIAL SEAL.]

G. F. DAMES,
Notary Public, Ramsey Co., Minn.

My Commission Expires 4/20/1922.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 11th day of August, 1916, before me appeared F. A. Chamberlain, to be known, who being by me duly sworn did say that he is president of the Minneapolis Eastern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that the said instrument was executed in behalf of said corporation by authority of its Board of Directors, and

that said F. A. Chamberlain acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and official seal the day and year first above written.

[NOTARIAL SEAL.] (Signed) E. C. LARPENTEUR,
Notary Public, Hennepin Co., Minn.

My Commission Expires July 22, 1919.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 10th day of August, 1916, before me appeared W. S. McCurdy, to me personally known, who being by me duly
292 sworn did say that he is the Attorney in Fact of the National Surety Company, the corporation described in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said W. S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and official seal the day and year first above written.

(Signed) E. M. CEDARLEAF,
[SEAL.] Notary Public, Ramsey Co., Minn.

My commission expires 6-2-20.

The within bond approved by me this 25th day of August, 1916.
(Signed) CALVIN L. BROWN,
Chief Justice.

(Endorsed:) In the Supreme Court of the United States. Minneapolis Civic & Commerce Association, Defendant in Error, vs. C. M. & St. P. Ry. Co., C. St. P. M. & O. Ry. Co., and M. E. Ry. Co., Plaintiffs in Error. Bond on Appeal. Filed Aug. 23, 1916. I. A. Caswell, Clerk.

293 In the Supreme Court of the United States.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
St. Paul, Minneapolis & Omaha Railway Company, and the Minneapolis Eastern Railway Company, Plaintiffs in Error,
vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of the State

of Minnesota, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the Minneapolis Civic & Commerce Association, plaintiff and defendant in error, and the Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Minneapolis Eastern Railway Company, defendants and plaintiffs in error, wherein was drawn in question the construction and application of certain clauses of the Constitution of the United States and certain statutes of the United States, and the decision was against the right and privilege specially set up and claimed under such clauses of the said Constitution and said statutes, a manifest error hath happened to the great damage of the said Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Minneapolis Eastern Railway Company, plaintiffs in error, as by their complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties

294 aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 14th day of August in the year of our Lord one thousand nine hundred and sixteen.

Done in the City of St. Paul, County of Ramsey, State of Minnesota, with the seal of the District Court of the United States for the district of Minnesota, attached.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,

*Clerk of the District Court of the United
States for the District of Minnesota.*

Allowed by:

CALVIN L. BROWN,

*Chief Justice of the Supreme Court
of the State of Minnesota.*

294½ [Endorsed:] 19878. In the Supreme Court of the United States. C. M. & St. P. Ry. Co., C. St. P. M. & O. Ry. Co. and M. E. Ry. Co., Plaintiffs in Error, vs. M. C. & C. Ass'n, Defendant in Error. Writ of Error. Filed Aug. 23, 1916. I. A. Caswell, Clerk.

295 STATE OF MINNESOTA, ss:

Supreme Court.

I, I. A. Caswell, clerk of the said court, do hereby certify that there

was lodged with me as such clerk on August 23, 1916, in the matter of Minneapolis Civic & Commerce Association, vs. Chicago, Milwaukee & St. Paul Ry. Co., et al.,

1. The original bond of which a copy is herein set forth;
2. Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 7th day of September, 1916.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

296

In the Supreme Court of the United States.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Defendant in Error,
VS.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
St. Paul, Minneapolis & Omaha Railway Company, and the Minneapolis Eastern Railway Company, Plaintiffs in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to Minneapolis Civic & Commerce Association, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Minneapolis Eastern Railway Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota.

CALVIN L. BROWN,
*Chief Justice of the Supreme
Court of the State of Minnesota.*

We, the undersigned, attorneys of record for Minneapolis Civic & Commerce Association, defendant in error in the above entitled case, hereby acknowledge due service of the above citation.

FRANK J. MORLEY,
LYNDON A. SMITH,
Att'y Gen'l.

August 23rd, 1916.

296½ [Endorsed:] 19878. In the Supreme Court of the United States. M. C. & C. Ass'n, Defendant in Error, vs. C. M. & St. P. Ry. Co., C. St. P. M. & O. Ry. Co. and M. E. Ry. Co., Plaintiffs in Error. Citation. Filed Aug. 23, 1916. I. A. Caswell, Clerk.

297 STATE OF MINNESOTA:

Supreme Court, April Term 1916.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Respondent,
vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
St. Paul, Minneapolis and Omaha Railway Company, and Minneapolis Eastern Railway Company, Appellants.

Præcipe.

To I. W. Caswell, Clerk of the Supreme Court:

Please prepare record in the above entitled cause taken on Writ of Error to the Supreme Court of the United States, and include therein:

(1) Caption, summons, petition, joint answer and appearance of defendants, record of District Court of Hennepin County, Minnesota, including testimony of witnesses, certificate of trial court respecting federal questions presented and considered, description of exhibits, proposal of settled case, stipulation that transcript containing the foregoing proceedings is correct and shall constitute the record, order of trial judge settling case, opinion of trial judge on decision of case, including his findings of fact and conclusions of law, memorandum opinion of trial judge, judgment of trial court, notice of appeal to the Supreme Court and acknowledgment of service thereof by respondent, all of which are contained in the printed record or paper book in the Supreme Court.

(2) Assignments of Error.

(3) Petition for Writ of Error.

(4) Bond on Writ of Error.

(5) Writ of Error.

298 (6) Order allowing Writ of Error.

(7) Certificate of Lodgment.

(8) Citation and Service.

(9) Return to Writ of Error.

(10) All minutes, orders and judgment of the court made in the case.

(11) All certificates made by the Clerk of this Court with reference to the proceedings, rulings and judgment of the court herein.

(12) All endorsements of filings and acknowledgment and proof of service of pleadings and other documents filed therein and mentioned above.

- (13) Opinion of Supreme Court filed July 21, 1916.
- (14) Certificate of the Clerk of this Court to the correctness of the records enumerated above.
- (15) Exhibits.

JAMES B. SHEEAN,
GEO. W. PETERSON,
F. W. ROOT,
W. H. NORRIS,
Attorneys for Appellants.

It is hereby stipulated by and between the above entitled parties that the record, documents and proceedings enumerated above shall constitute the transcript of record on Writ of Error to the Supreme Court of the United States in the above entitled cause, and the Clerk of the Supreme Court in the State of Minnesota is hereby requested and authorized to transmit only the papers designated in the above præcipe.

Dated, Aug. 30, 1916.

LYNDON A. SMITH,
FRANK J. MORLEY,
Attorneys for Respondent.
JAMES B. SHEEAN,
GEO. W. PETERSON,
F. W. ROOT,
W. H. NORRIS,
Attorneys for Appellants.

298½ [Endorsed:] State of Minnesota, Supreme Court, April Term 1916. Minneapolis Civic & Commerce Association, vs. Chicago, Milwaukee & St. Paul Ry. Co., Chicago, St. Paul, Minneapolis and Omaha Ry. Co. and Minneapolis Eastern Ry. Co. Præcipe.

299 UNITED STATES OF AMERICA, ss:

Supreme Court of Minnesota.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, at my office, in the city of St. Paul, Minnesota, this —

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Before the Railroad and Warehouse Commission of the State of Minnesota.

In the Matter of the Petition of the Minneapolis Civic and Commerce Association Against the Chicago, St. Paul, Minneapolis & Omaha Railway Company, Chicago, Milwaukee & St. Paul Railway Company and Minneapolis Eastern Railway Company.

W. P. Trickett, George T. Simpson, W. R. Cray, Frank J. Morley, Minneapolis, Minn., Littleford, James, Ballard & Frost, Francis B. James, E. E. Williamson, Washington, D. C., and Francis B. James, of counsel representing the petitioners.

J. B. Sheean and F. W. Root, representing respondents.

This petition was brought on behalf of the Minneapolis Civic and Commerce Association for the purpose of having the Commission determine that the Minneapolis Eastern Railway Company is a part of the terminals of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and to forbid the imposition of a switching charge of \$1.50 per car upon all line haul traffic transported by the said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company which is handled by the Minneapolis Eastern Railway Company, and to require the defendants to publish and maintain switching tariffs applicable to local or industrial traffic which shall be fair and reasonable in and of themselves, the same to apply to and from all industries served by the Minneapolis Eastern Railway Company without assessment of separate or additional charge therefor. No testimony was presented which challenged the reasonableness of the charges made by the Minneapolis Eastern Railway Company in and of themselves, and hence that part of the petition is dismissed without further consideration.

301 After considering all the evidence the Commission finds:

1. That the Minneapolis Civic and Commerce Association is a corporation duly organized under the laws of the state of Minnesota and has as its object and purpose the general betterment of civic, commercial and industrial conditions in the city of Minneapolis and the territory thereof and adjacent thereto.

2. That the Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation organized under the laws of the state of Wisconsin and operates as a common carrier 1,672.71 miles of railroad, of which 431.72 miles are within the state of Minnesota, and that it has important and extensive terminals within the city of Minneapolis.

3. That the Chicago, Milwaukee & St. Paul Railway Company is a corporation organized under the laws of the state of Wisconsin and operates as a common carrier 9,373.31 miles of railroad, of which 1,241.75 miles are within the state of Minnesota, and that

it has important and extensive terminals within the city of Minneapolis.

4. That the Minneapolis Eastern Railway Company is a corporation organized under the laws of the state of Minnesota in 1878 and that its articles of incorporation were, on the 27th day of January, 1879, amended so that the general nature of its business was "the building and operating a railway from the city of Minneapolis in the county of Hennepin, and state of Minnesota, to the city of St. Paul, in the county of Ramsey, in said state, with branches connecting with any and all railroads now built or hereafter to be built or secured or constructed to or into the said cities or either of them; also branches to mills and manufactories in said cities or either of them; the said railway and branches to be constructed and operated with one or more tracks and with all necessary side tracks, turn outs and connections, and all necessary roadway, rights of way, depot grounds, yards, machine shops, warehouses, elevators, depots, station houses, structures, buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway." Said railroad claims to own 4.7 miles of railroad and actually operates but 2.63 miles thereof, of which 1.07 is main line track and 1.56 miles is yard track and sidings. The balance of 1.02 miles is located on the east side of the Mississippi River and is now operated by the Great Northern Railway Company. The company was organized by the millers of Minneapolis and all of the members of the first board of directors were engaged in the milling business. About four years after its organization the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company became the owners thereof by each acquiring one half of its capital stock, then issued to the amount of \$30,000.00. Instead of paying dividends on this stock from 1882 to 1906 the company invested its surplus amounting to \$95,000.00, in improvements and additions, and in 1906 it capitalized these investments and the stock then issued was equally divided between its two stockholders. The original issue of 7% first mortgage bonds in the sum of \$150,000.00 was guaranteed by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and these were refunded by the issue of 4½% bonds in the same amount on January 1st, 1909, of which \$75,000.00 is owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and \$75,000.00 by the Chicago, Milwaukee & St. Paul Railway Company. Interest upon the bonds is paid regularly to the railroad companies.

5. That the Minneapolis Eastern Railway Company serves numerous large industries which are located upon its tracks, and that the receiving and delivering of line haul cars to and from the Chicago, St. Paul, Minneapolis and Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company is of great advantage to said companies as it enables them to control important

traffic to and from mills and elevators. That the following named industries are located upon the tracks of the said railway:

303 Barber Milling Company,
"Cataract Mill."

New Occidental Milling Company,
"Occidental Mill."

Northwestern Consolidated Milling Company,

"B" Mill.

"C" "

"D" "

"E" "

"H" "

"Excelsior Warehouse."

Pillsbury Flour Mills Company,

"C" Warehouse.

"B" Mill.

"B" Elevator.

"Palisade" Mill.

Washburn Crosby Company,

"D" Mill.

6. That the rate fixed in the tariff of the said Minneapolis Eastern Railway Company for handling inbound carloads is \$1.50 per car, and for outbound carloads ten cents per ton with a minimum of \$1.50 per car, and that grain is the principal inbound and flour the outbound shipment; that said company issues no billing upon freight and makes no direct charge against a shipper, except in a few cases.

7. That large mills and elevators in Minneapolis are also located upon the tracks which are exclusively owned and controlled by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and by the Chicago, Milwaukee & St. Paul Railway Company, and that the service performed in handling cars to and from said mills and elevators is substantially the same as that which is performed

304 in the handling of cars to and from the Minneapolis Eastern Railway Company; that the charge made by the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company for delivering a car of grain to a mill or elevator located upon the tracks of the Minneapolis Eastern Railway Company is \$1.50 per car in addition to the line rate from the point of origin, while there is no charge made by either company in addition to the line rate for delivering a car to a mill or elevator located upon the rails exclusively operated by the Chicago, St. Paul, Minneapolis & Omaha Railway Company or the Chicago, Milwaukee & St. Paul Railway Company.

8. That by its absorption tariff the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company absorb the switching charge made

against all outbound carloads upon which it enjoys a line haul coming from the mills and elevators located upon the tracks of the Minneapolis Eastern Railway Company, and that from a practical standpoint shippers of inbound grain are the only persons who have to pay the charge of the Minneapolis Eastern Railway Company.

9. That the Minneapolis Eastern Railway Company is managed and operated by its board of directors who are now and for a long period of time have been officers of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company who receive their entire compensation from said railway companies. That the general control of said company is in charge of a managing committee consisting of Mr. A. W. Trenholm, General Manager of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Mr. J. H. Foster, General Superintendent of the Chicago, Milwaukee & St. Paul Railway Company. A superintendent is employed and he hires the switchmen, enginemen, car repairers and other employes, and they are paid by the Minneapolis Eastern Railway Company. The company owns its own equipment and performs services for all railroads on equal terms.

305 10. That the said Minneapolis Eastern Railway Company files its annual reports and its tariff with the Interstate Commerce Commission and the Minnesota Railroad and Warehouse Commission as provided by law, and pays taxes to the state upon its gross earnings, and in said reports it claims to be a switching road and claims that the control by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company is direct.

11. That the tracks operated by the Minneapolis Eastern Railway Company are an important, convenient and necessary terminal facility for the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company and that said companies do directly influence, control and operate said company.

As conclusions of law from the foregoing facts, the Commission finds that the certain 1.07 miles of main line track and 1.56 miles of yard tracks and sidings, including ground and all railway facilities, which are operated by the Minneapolis Eastern Railway Company, is a part of the terminal property of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company; that it is the duty of said railway companies, and each of them, without charge to deliver to, or receive from industries located upon said terminals, carload shipments upon which they, or each of them, receive a line haul; that the charge of \$1.50 per car on inbound grain which is delivered to mills and elevators located upon the rails now operated by the Minneapolis Eastern Railway Company gives an unlawful and unjust preference and advantage to mills and elevators located upon the rails which are exclusively owned by the Chicago, St.

Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company.

306 It is therefore ordered that the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and the Minneapolis Eastern Railway Company, and each of them, cease and desist from charging \$1.50 per car for handling inbound shipments over the lines of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company and each of them which are delivered by the Minneapolis Eastern Railway Company to mills or elevators located upon the tracks now operated by the same, or delivered by said company to connecting carriers, and that said Minneapolis Eastern Railway Company cease and desist from charging \$1.50 per car or any other sum for delivering carload shipments of freight moving from connecting carriers to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, or each of them, or from mills and elevators located upon the tracks now operated by said Minneapolis Eastern Railway Company to the said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, or each of them, and that said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and each of them, be, and the same are hereby required to operate said main track, yard track and sidings as a part of the terminal property of each of said railroads within the city of Minneapolis. This order shall apply only to intrastate shipments of freight, and shall take effect on the first day of February, A. D. 1915.

By order of the commission.

[Seal Railroad and Warehouse Commission, State of Minn.]

A. C. CLAUSEN, *Secretary*.

Dated at St. Paul, Minnesota, January 8th, A. D. 1915.

307

Memorandum.

As a general proposition of law the mere fact that the stock of one railroad company is owned by another does not make them one system. Pullman Car Co. vs. Missouri Pacific, 115 U. S. 587; Connelly vs. Mathieson Alkali Works, 190 U. S. 406; Peterson vs. C. R. I. & P., 205 U. S. 364; Interstate Commerce Commission vs. Stickney 215 U. S. 98; U. S. vs. D. & H. Company, 213 U. S. 366.

But where a corporation directly controls and operates the corporation whose stock it owns the two should be considered as a single system. Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498; U. S. vs. St. Louis Terminal, 224 U. S. 383; State ex rel. vs. Standard Oil Co., 49 Ohio State 137; People vs. N. R. S. R. Co., 121 New York 582; "Mortawetz on Private Corporations," Volume 1, Section 227; "Thompson on Corporations," Second Edition, Volume 1, Section 10.

In the case of Southern Pacific Terminal Co. vs. Interstate Com-

merce Commission 219 U. S. page 498, Mr. Justice McKenna said at page 521:

"Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the company if we regard only their characters; there is a union of them if we regard their control and operation through the Southern Pacific. This control and operation are important facts to dispose of."

Mr. Justice McKenna further said at page 533:

"In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which is content to hold; it presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with a system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have
308 in a sense separate corporate operation; but they are directed by the same paramount and binding power and made single by it. In all transactions it is treated as single."

The courts have recognized that there is a difference between railroad transportation companies and terminal companies. The terminal company is an instrumentality which assists the railroad company in the transfer of traffic between different lines and in the collection and the distribution of traffic. They are a modern evolution in the doing of railroad business and are of the greatest public utility.

U. S. vs. Terminal Association, 224 U. S. 56, Law Edition, 810;

State vs. St. Paul Union Depot Co., 42 Minn. 142;

St. Paul Union Depot Co. vs. Minnesota & Northwestern R. Co., 47 Minn. 154.

While the Commission recognizes the legal right of railroad companies to own and control terminal companies, it believes that the law does not permit such ownership and control to be used as a device for increasing transportation or terminal charges.

309 [Endorsed:] Pl'tf "A."

310

Ex. B.

1.

Part "B."

Copy.

Articles of Incorporation of the Minneapolis Eastern Railway Company.

First.

The name of the corporation hereby organized is the Minneapolis Eastern Railway Company. The general nature of the business to be transacted by the said corporation is the building and operating a railway from the City of Minneapolis, County of Hennepin, State of Minnesota, to the City of St. Paul, County of Ramsey in said State, and the principal place of the transacting of said business is the said City of Minneapolis.

Second.

The time of commencement of the said corporation is the 18th day of June, 1878 and the period of continuance of the said corporation is one thousand years.

Third.

The amount of capital stock of said corporation is one million dollars, to be paid in, in cash, in installments, as the same may be ordered by the board of directors, but not more than five per cent per month.

Fourth.

The highest amount of indebtedness or liability to which said corporation shall at any time be subject is half a million dollars.

Fifth.

The names and places of residence of the persons forming this association for incorporation are Joel B. Bassett, Carroll T. Hobart, George W. Goodrich, Edwin R. Barber, Francis T. Hinkle, Leonard Day and Jaber M. Robinson, all residents of the City of Minneapolis aforesaid.

Sixth.

The names of the first board of directors of the said corporation are Joel B. Bassett, Charles A. Pillsbury, Carroll T. Hobart, George W. Goodrich, Edwin R. Barber, Francis T. Hinkle, Leonard Day, Jaber M. Robinson and Ransom D. Warner.

The government of the said corporation and the management of its affairs shall be vested in the board of directors who shall be elected annually on the second Monday of June.

Seventh.

The number and amount of the shares in the capital stock of the said corporation are ten thousand shares of one hundred dollars each.

JOEL B. BASSETT.
CARROLL T. HOBART.
EDWIN R. BARBER.
FRANCIS T. HINKLE.
G. W. GOODRICH.
J. M. ROBINSON.
LEONARD DAY.

311

Office of Register of Deeds,
Hennepin County.

I, Jno. F. Peterson, Register of Deeds, within, and for said county of Hennepin, do hereby certify that I have carefully compared the above and foregoing copy of Articles of Incorporation with the original thereof recorded in my office in Book 8 of Misc. Records page 103 and that the same is a correct and true transcript and copy of the same and of the whole thereof. And I do further certify that I am the officer in whose custody said record is required by law to be kept.

In Witness Whereof, I have hereunto set my hand and official seal this 19th day of May, 1887.

JNO. F. PETERSON,
Register of Deeds, Hennepin County, Minn.

STATE OF MINNESOTA,
County of Hennepin, ss:

Be it known that on this eleventh day of June A. D. 1878 personally came before me a Notary Public in and for said county of Hennepin, Joel B. Bassett, Carroll T. Hobart, Edwin R. Barber, Francis S. Hinkle, G. W. Goodrich, J. M. Robinson and Leonard Day to me known to be the same persons who signed and executed the above articles of incorporation and they each acknowledged that they executed the same freely and voluntarily for the purposes therein expressed.

[NOTARIAL SEAL.]

FRANK H. CARVER,
Notary Public, Minnesota.

State of Minnesota,
Department of State.

I hereby certify that the within Instrument was filed for record in

this office on the 17th day of June A. D. 1878 at 12 o'clock noon and was duly recorded in Book D of Incorporations on pages 361 and 362.

J. T. IRGENS,
Secretary of State.

State of Minnesota,
Department of State.

I hereby certify that I have carefully compared the foregoing with the official record on file in this Department, and that it is a true and correct copy thereof, and of the whole of the same.

Witness my hand and the Great Seal of the State this 8th day of October A. D. 1881.

[NOTARIAL SEAL.]

FRED VON BAUMBACH,
Secretary of State.

312

Ex. C.

2.

Pl'tf "C."

Copy.

Minutes of Board of Directors' Meeting Held October 25, 1878, Which Was the Meeting of the Directors Last Prior to the Acquisition of the Capital Stock of the Minneapolis Eastern Railway Company by the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Minutes of Meeting of Directors of the Minneapolis Eastern Railway Held at the Office of the Company October 25, 1878, at 12½ o'clock P. M.

Present: Messrs. J. B. Bassett, Pres. C. T. Hobart, Vice Pres. E. R. Barber, Sec., and C. G. Goodrich and J. M. Robinson.

Meeting called to order by the President and the following resolution read by Mr. Hobart.

Resolved that the route of the roadway of this Company be and the same is hereby located in the City of Minneapolis as the same appears upon the map of the Company on file in the office of the Company. The area of the right of way being embraced within the yellow shaded portions of said map the main line thereof extending from its junction with the St. Paul and Pacific Railroad to tenth (10th) Ave. South (except as hereinafter provided) with a branch or spur extending from its junction with said Main Line along on the Northerly side of the Minneapolis and St. Louis Railroad and through blocks eighteen (18) seventeen (17) and along the

North side of Block sixteen (16) in Minneapolis as shown on said map, the said main line being also shown upon a map filed with the report of Commissioners made and filed in the office of the Clerk of the District Court in Hennepin County Minnesota on the 23rd day of October, A. D. 1878.

And, be it further resolved that the following designated portions of said roadway of said Main Line as shown on said map that is to say all that portion thereof embraced within the flouring mill site of John W. Hobart and Benjamin P. Shuler, known as the Arctic Mill Site and all that portion thereof embraced within the flouring mill site of Leonard Day, Lorenzo D. Day, John W. Day, Augustina H. Day and the Estate and heirs at law of R. D. Stevens deceased, known as the Palisade Mill site and all that portion thereof lying between the South Easterly line of said last described Mill site extended and Tenth Avenue South and the condemnation thereof for railway purposes be and the same are hereby abandoned renounced and discontinued, for the reason that said portion of said Arctic Mill site is not needed for said railway and it is hereby determined by this Company that the necessity of the appropriation of the land within said Palisade Mill site and between the Easterly side of said Mill site extended and Tenth Avenue South, is not so great as to justify the expense of paying the amounts of money necessary to acquire the right of way over the same by the proceedings for the condemnation thereof by this Company, and the Attorneys for this company are hereby instructed and directed to make and file in said Court on behalf of this Company such written renunciation and abandonment of said designated parcels of said strip of land, as may be proper and necessary.

It was moved and seconded that the above resolution as adopted and on being put to vote was carried unanimously.

Moved and seconded that we adjourn to meet of the office of Mc-Nan Lochren and Gilfillian at two P. M. Carried.

(Signed)

E. R. BARBER, *Secretary*.

313 Pursuant to the above adjournment the Board of Directors again met at the office of Lochren McNan and Gilfillian at two o'clock P. M. October 25th, 1878.

Present: Messrs. J. B. Bassett, C. T. Hobart, C. G. Goodrich, J. M. Robinson and E. R. Barber: Meeting called to order by the President. Moved and seconded that C. H. Pettit be appointed as Trustee of certain shares of stock of the Minneapolis Eastern Railway and that they be issued to said C. H. Pettit. Carried.

The Board then adjourned to again meet at the same place on October 26, 1878, at two o'clock P. M.

E. R. BARBER, *Secretary*.

Pursuant to the adjournment the Board again met at the office of Lochren McNan and Gilfillian on October 26, 1878, at two o'clock P. M.

Present: Messrs. J. B. Bassett, C. T. Hobart, C. G. Goodrich, J. M. Robinson and E. R. Barber. The Board having under consideration the matter of the proposed contract hereinafter referred to.

Mr. Hobart offered the following resolution.

Resolved that the proposed contract of this Company as party of the first part with the Chicago, Milwaukee and St. Paul Railway Company, as party of the second part and the Chicago, St. Paul and Minneapolis Railway Company as party of the third part be adopted and entered into by this company and that the President and Secretary execute the same in triplicate as such officers in the name and behalf of this company and attest the same with the seal of the Company, the said proposed contract being now in writing and as follows, that is to say:—

This agreement made this twenty fifth day of October A. D. 1878, between the Minneapolis Eastern Railway Company party of the first part, The Chicago Milwaukee and St. Paul Railway Company party of the second part and the Chicago, St. Paul and Minneapolis Railway Company party of the third part.

Witnesseth: That in consideration of the mutual covenants herein contained the said parties do hereby mutually agree as follows:

First. There shall be issued only Three Hundred (300) shares of the capital stock of the said The Minneapolis Eastern Railway Company during the continuance of this contract, of which stock One Hundred and Forty Five (145) shares shall be issued to Curtis H. Petit as Trustee for said Minneapolis Eastern Railway Company and five (5) shares shall be issued, one share each to the several directors of said Company residing at Minneapolis and their successors in office, Seventy Five (75) shares shall be issued to the party of the second part or such person as it may select and Seventy Five (75) shares to the party of the third part or such party as it may select. The said One Hundred and Forty Five (145) shares so issued to the said Curtis H. Petit Trustee as well as the shares issued to said five directors, as aforesaid shall not be transferable except by the written consent of all said parties hereto and any transfer thereof without such consent shall be void and of no force or effect.

Second. On or before the first day of December next the Board of Directors of the said party of the first part shall cause two persons to be named by the party of the second part and two persons to be named by the party of the third part to be elected into said Board as Directors, and shall cause the necessary vacancies to be made in the said Board for that purpose.

Third. The said party of the first part shall forthwith locate the line of its railway heretofore surveyed from the point of junction with the St. Paul and Pacific Railroad to a point opposite the Palisade Mill; also from a point on said line at or near Second Avenue South extended, through Blocks Eighteen and Seventeen and along the Northerly side of fractional block Sixteen in Minneapolis to Sixth Avenue South in the City of Minneapolis, and as soon as possible procure the right of way and immediately commence the construction of its railway along the whole length of the lines so located and

complete the same with necessary side tracks as a railway as soon as practicable.

314 Fourth. The said party of the first part shall prepare and execute in proper form One Hundred and Fifty bonds of One Thousand Dollars each running twenty years with interest at Seven per cent per annum payable semi annually with coupons for said interest attached to secure the payment thereof said party of the first part shall execute a mortgage in proper form to Sherburne S. Merrill and William H. Ferry as Trustees, covering the said railway, and all the right of way, grounds, property, rolling stock and equipment and all the rights, privileges and franchises of said Company in such form and manner as counsel learned in the law shall prescribe and cause the same to be properly recorded so as to become the first lien on said Railway and property.

Fifth. In consideration of the premises the said parties of the second and third parts agree to purchase so many of said bonds at the rate of Eighty per cent of their par value as may be necessary to furnish a fund sufficient to pay for the right of way, construct and complete said railway within the termini above mentioned and to equip the same ready for business each of the said second and third parties taking and paying for an equal amount thereof to be paid for from time to time as required by the party of the first part to pay for said right of way and the construction and equipment of said railway.

Sixth. It is mutually agreed that the said second and third parties are to have equal and the same rights in and to the said railway of the party of the first part in all respects; that they are to pay the same price for switching and handling their respective cars on said railway and that no partiality or favor is to be shown or extended to one of said parties over the other and that the business of each is to be transacted with equal promptness and dispatch and it is further agreed that the Superintendent or person having charge of the operation thereof shall be appointed by the consent and mutual agreement of all the parties to these presents.

Seventh. The said party of the first part shall charge all persons and parties for switching loaded cars either in or out over said track the sum of one dollar for each loaded car, but in consideration that the parties of the second and third parts shall have advanced the money necessary to build and complete said railway a rebate of fifty per cent of said charge shall be made to each of said second and third parties on their business on said railway.

Eighth. In case any other railroad company having equal facilities of access to the Mills at Minneapolis with the railway of the party of the first part, shall promptly and satisfactorily do the switching for said second and third parties hereto, to said mills over its said railroad, then and in that case the said party of the first part, with the written consent of the said second and third parties, will do switching for such railroad company over the said railway of the party of the first part on the same terms that switching for the said second and third parties is done over such other railroad but in such case the price for switching to be charged and collected by said party

of the first part shall be uniform as to all and without rebate to any person or company.

Signed by

[Minneapolis Eastern Railway Company Corporate Seal.]

MINNEAPOLIS EASTERN RAILWAY
COMPANY.

J. B. BASSETT, *President.*

E. R. BARBER, *Secretary.*

Which resolution was on motion adopted.

Mr. Bassett then offered the following resolution:

Resolved, that the proposal of Messrs. Winston Bros. for the construction of a railroad from the Palisade Mill Site to the junction with the St. Paul and Pacific railroad be accepted and that a contract be entered into with said Winston Bros. for the construction of said railroad and submitted to the Board of Directors for their approval.

Resolution was on motion adopted.

315 The Board then adjourned to meet again at the office of Messrs. Lochren McNair and Gilfillian on October 28, 1878, at ten o'clock A. M.

E. R. BARBER, *Secretary.*

316 Ex. D.

Pl'tf D.

3.

Copy.

Contract Between Minneapolis Eastern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, Chicago, St. Paul and Minneapolis Railway Company.

This agreement made this twenty-fifth day of October A. D. 1878, between the Minneapolis Eastern Railway Company, party of the first part, the Chicago, Milwaukee and St. Paul Railway Company, party of the second part, and the Chicago, St. Paul and Minneapolis Railway Company, party of the third part.

Witnesseth: That in consideration of the material covenants herein contained, the said parties do hereby mutually agree as follows:

First. There shall be issued only three hundred (300) shares of the capital stock of the said the Minneapolis Eastern Railway Company during the continuance of this contract, of which stock one hundred and forty-five (145) shares shall be issued to Curtis H. Pettit as trustee for said Minneapolis Eastern Railway Company, and five shares shall be issued, one share each to the several directors of said Company, residing at Minneapolis, and their successors in office, seventy-five (75) shares shall be issued to the party of the second part or such persons as it may select and seventy-five (75) shares to

the party of the third part, or such party as it may select. The said one hundred and forty-five (145) shares so issued to the said Curtis H. Pettit, Trustee, as well as the shares issued to said five directors as aforesaid shall not be transferrable except by the written consent of all said parties hereto and any transfer thereof without such consent shall be void and of no force or effect.

Second. On or before the first day of December next the Board of Directors of the said party of the first part shall cause two persons to be named by the party of the second part and two persons to be named by the party of the third part, to be elected into said Board, as directors, and shall cause the necessary vacancies to be made in the said Board for that purpose.

Third. The said party of the first part shall forthwith locate the line of its railway theretofore surveyed from the point of junction with the St. Paul and Pacific Railroad to a point opposite the Palisade Mill, also from a point on said line at or near Second Avenue, South, extended, through Block- Eighteen and Seventeen and along the northerly side of fractional Block Sixteen in Minneapolis to Sixth Avenue South in the City of Minneapolis and as soon as possible procure the right of way and immediately commence the construction of its railway along the whole length of the lines so located and complete the same with necessary side tracks as a railway as soon as practicable.

Fourth. The said party of the first part shall prepare and execute in proper form one hundred and fifty bonds of one thousand dollars each running twenty years with interest at seven per cent per annum, payable semi-annually, with coupons for said interest attached and to secure the payment thereof said party of the first part shall execute a mortgage in proper form to Sherburn S. Merrill and William H. Ferry, as Trustees, covering the said railway, and all the right of way, grounds, property, rolling stock and equipments, and all the rights, privileges and franchises of said company in such form and manner as counsel learned in the law shall prescribe, and cause the same to be properly recorded, so as to become the first lien on said railway and property.

317 Fifth. In consideration of the premises the said parties of the second and third parts agree to purchase as many of said bonds at the rate of eighty per cent of their par value as may be necessary to furnish a fund sufficient to pay for the right of way, construct and complete said railway within the termini above mentioned and to equip the same ready for business, each of the said second and third parties taking and paying for an equal amount thereof to be paid for from time to time as required by the party of the first part to pay for said right of way and the construction and equipment of said railway.

Sixth. It is mutually agreed that the said second and third parties are to have equal and the same rights in and to the said railway of the party of the first part in all respects, that they are to pay the same price for switching and handling their respective cars on said railway and that no partiality or favor is to be shown or extended to one of said parties over the other and that the business of

each is to be transacted with equal promptness and dispatch, and it is further agreed that the superintendent, or person having charge of the operation thereof shall be appointed by the consent and mutual agreement of all the parties to these presents.

Seventh. The said party of the first part shall charge all persons and parties for switching loaded cars either in or out over said track the sum of one dollar for each loaded car. But in consideration that the parties of the second and third part shall have advanced the money necessary to build and complete said railway a rebate of fifty per cent of said charge shall be made to each of said second and third parties on their business on said railway.

Eighth. In case any other railroad company having equal facilities of access to the mills at Minneapolis with the railway of the party of the first part shall promptly and satisfactorily do the switching for said second and third parties hereto, to said mills over its said railroad, then and in that case the said party of the first part with the written consent of the said second and third parties, will do switching for such railroad company over the said railway of the party of the first part on the same terms that switching for the said second and third parties is done over such other railroad, but in such case the price for switching to be charged and collected by said party of the first part shall be uniform as to all and without rebate to any person or company.

MINNEAPOLIS EASTERN RAILWAY COMPANY,

[CORPORATE SEAL.] By J. B. BASSETT, *President*.

E. R. BARBER, *Secretary*.

THE CHICAGO, MILWAUKEE & ST. PAUL RY.,

[CORPORATE SEAL.] By ALEX. MITCHELL, *Pr't*.

Attest:

R. D. JENNINGS, *Secretary*.

THE CHICAGO, ST. PAUL AND MINNEAPOLIS RY. CO.,

[CORPORATE SEAL.] By H. H. PORTER, *President*.

Attest:

C. W. PORTER, *Secretary*.

Supplemental Agreement.

This Agreement made this twentieth day of December A. D. 1878, by and between the Minneapolis Eastern Railway Company, party of the first part, the Chicago, Milwaukee & St. Paul Railway Company, party of the second part, and the Chicago, St. Paul and Minneapolis Railway Company, party of the third part:

Witnesseth: That whereas a certain contract or agreement was executed between the above named parties bearing date the twenty-fifth day of October, 1878, these farther covenants and agreements are made and agreed to by the above named parties as sup-

plemental to the same, but providing, with united agreement of all parties for the annulling and amending of the contract, otherwise leaving all the covenants and agreements in the said contract in full force, the agreements herein made being in addition to each and all of the covenants and agreements of the said contract.

First. The agreement above referred to bearing date October 25th, A. D. 1878, shall remain in full force and binding upon the Minneapolis Eastern Railway Company, the Chicago, Milwaukee and St. Paul Railway Company and the Chicago, St. Paul and Minneapolis Railway Company in all its terms and provisions and upon the successor or successors of each of said companies until the first day of May in the year of our Lord one thousand nine hundred and eighteen, provided nevertheless if each and all of the above named parties shall mutually agree to any alterations or amendments of the same, or to the annulling of the same, it shall be competent for them to do so.

Second. It is further agreed by the parties hereto that should any difference arise between the parties hereto about the terms conditions or provisions of the agreement above referred to, each difference shall in no manner affect the same, or the rights or obligations of the parties thereto under the same as to business of every kind and description or rights or obligations not affected by such difference and the same shall be continued in all respects as though no such difference had arisen.

It is further agreed that all such matters of difference, if any, shall be referred to three arbitrators for settlement, the decision of any two of whom shall be binding and conclusive upon the parties hereto as to all matters of difference submitted to them. If the question of difference shall be between one party on one side and the two other parties on the other side, then the party representing one side shall elect one arbitrator, and the other two parties shall elect one arbitrator, and the two so elected shall elect a third, who shall each be disinterested freeholders of the States of Illinois, Wisconsin or Minnesota. If the question of difference shall be of such a nature that no two of the three parties can agree, then each of said parties may choose an arbitrator, and if no two arbitrators can agree then two or three of the arbitrators may select a final umpire, who shall be, as well as each of the others, disinterested freeholders of the States of Illinois, Wisconsin or Minnesota, and the decision of the umpire so

selected shall be binding and conclusive upon the parties hereto as to all matters of difference submitted to him.

CHICAGO, MILWAUKEE & ST.
PAUL RY. CO.,

[CORPORATE SEAL.] By ALEX. MITCHELL, *President*.

Attest:

R. D. JENNINGS, *Secretary*.

CHICAGO, ST. PAUL & MINNE-
APOLIS RY. CO.,

[CORPORATE SEAL.] By H. H. PORTER, *President*.

Attest:

C. W. HILLARD, *Ass't Secretary*.

MINNEAPOLIS EASTERN RAIL-
WAY COMPANY,

[CORPORATE SEAL.] By J. B. BASSETT, *President*.

Attest:

C. R. BARBER, *Secretary*.

319

Ex. E.

4.

Pl'tf "E."

Minutes of Meeting at which Amendments to the Articles of Incorporation of the Minneapolis Eastern Railway Company Were Adopted.

Meeting of January 27, 1879.

The Board of Directors met at the office of Lochren McNair and Gilfillian at 3 o'clock P. M., President Bassett in the chair.

Present: J. B. Bassett, C. F. Hobart, C. H. Prior, J. W. Heinon, J. A. Chandler and E. R. Barber.

Director C. F. Hobart offered the following resolution; resolved by the Minneapolis Eastern Railway Company that the following amendment to the Articles of Incorporation of this company be and the same is hereby adopted by this company to be substituted for and take the place of Article 1, of the original articles, the same having been reduced to writing and executed by the corporators of this company in the words and figures following, that is to say;

Amendments to Articles of Incorporation of the Minneapolis Eastern Railway Company.

We whose names are hereunto subscribed having associated ourselves together for the purpose of incorporation and becoming in-

corporated under and by virtue of the laws of the State of Minnesota, and to that end have adopted and signed Articles of Incorporation executed and acknowledged on the eleventh (11th) day of June A. D. 1878, do now adopt and do hereby and in pursuance of a resolution this day duly passed at a regular meeting of the directors of said corporation, adopt and sign the following new and amended article, to be substituted for and to take the place of Article 1 of said original articles of incorporation—viz:

Article 1.

The name of this corporation is the Minneapolis Eastern Railway Company, and the general nature of the business to be transacted by the said corporation is the building and operating a railway from the City of Minneapolis in the County of Hennepin, and State of Minnesota, to the City of St. Paul, in the County of Ramsey, in said State—with branches connecting with any and all railroads now built or hereafter to be built or secured or constructed to or into the said cities or either of them, also branches to mills and manufactories in said cities or in either of them; the said Railway and branches to be constructed and operated with one or more tracks and with all necessary side tracks, turnouts and connection, and also necessary roadway, rights of way, depot grounds, yards, machine shops, warehouses, elevators, depots, station houses, structures, buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway. The principal place of transacting the business of such corporation is and shall be in the city of Minneapolis aforesaid.

(Signed)

J. B. BASSETT.
CARROL T. HOBART.
E. R. BARBER.
J. M. ROBINSON.
G. W. GOODRICH.
LEONARD DAY.
FRANCIS S. HINKLE.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this twenty seventh day of January A. D. 1879 before me personally came Joel B. Bassett, Carroll T. Hobart, Edwin R. Barber, George W. Goodrich, Leonard Day and Jabez M. Robinson, all to me personally known to be the identical persons who are named in and who executed the foregoing amendments to Articles of Incorporation and acknowledged that they executed the same freely and voluntarily for the uses and purposes therein expressed.

[NOTARIAL SEAL.]

S. B. CHASE,

Notary Public, Hennepin County, Minnesota.

Director J. A. Chandler then offered the following resolution and moved its adoption—viz: Resolved by the Minneapolis Eastern Railway Company that the bond of this company to the aggregate amount of One Hundred and Fifty Thousand Dollars (\$150,000) be and the same are hereby ordered to be issued signed by the President and Secretary of this Company or so much thereof as may be necessary to pay for right of way and construction and rolling stock and equipment of the Railway of this Company, and to reimburse for the moneys heretofore advanced to this Company for said purposes, the said bonds to be issued in denominations of One Thousand Dollars (\$1,000) each bearing date the first day of January A. D. 1879 and payable on the first day of January A. D. 1909 to Sherburne S. Merrill or to William H. Ferry or bearer at the office or agency of this company in the City of New York with interest thereon from the first day of January A. D. 1879 at the rate of seven per cent per annum payable semi-annually on the first days of January and July in each year to be evidenced by coupons annexed to said bonds and signed by the Secretary, the said bonds to be signed and issued to the Treasurer of this Company and to be negotiated only so fast as necessary for said purposes at not less than eighty per cent of their par value. And resolved further that a deed of trust or mortgage be executed by this Company signed by its President and Secretary to the said Sherburne S. Merrill and William H. Ferry in trust, in the said sum of One Hundred and Fifty Thousand Dollars and conveying all and singular the railroad of this company now being constructed from a junction with the St. Paul and Pacific Railroad to a point opposite the Palisade Mill in the City of Minneapolis all in the County of Hennepin and State of Minnesota including all the Railways, ways, rights of way, depot grounds, and other lands for rights of way, or for railroad uses, and other property as described in the printed blanks now prepared for such purpose, for the security of the payment of said bonds and interest. Which resolution was unanimously adopted. The meeting then adjourned.

E. R. BARBER, *Secretary.*

321

PL'T'F "F."

5.

Meeting of June 20, 1882 (Page 35).

"The meeting of the Board of Directors was held at the Nicollett House Minneapolis at 10.00 o'clock A. M. of this day.

Present: Messrs. Bassett, Barber, Chandler, Prior, and Truesdale.

Absent: Messrs. Clarke, Hobart, Pillsbury and Robinson.

The President having taken the chair the minutes of the last meeting were read and approved.

The Committee on bylaws presented their report which was laid on the table.

The Committee appointed to prepare stock certificates and transfer books, presented their report and the forms of certificates and transfers. The report was accepted and the forms presented were adopted and the Committee was discharged.

322 The Secretary submitted the following list of the present stockholders of the company and of the number of shares held by each of them respectively:

Joel B. Bassett	one share.
Edwin R. Barber	one share.
G. W. Goodrich.....	one share.
Carroll T. Hobart.....	one share.
S. S. Merrill.....	one share.
S. S. Merrill, Trustee.....	73 shares.
C. H. Pettit, Trustee.....	145 shares.
C. A. Pillsbury.....	one share.
H. H. Porter.....	73 shares.
J. M. Robinson	one share.
R. D. Warner.....	one share.
E. W. Winter.....	one share.

Total 300 shares being the amount authorized to be issued by the Board of Directors at their meeting held October 6th, 1881.

The report of the Secretary was received and the list of stockholders was accepted and ordered to be entered as the list of stockholders of record this day. The following resolution offered by Mr. Chandler and seconded by Mr. Barber was unanimously adopted. Resolved that the device hereon impressed be and is hereby adopted as the corporate seal of this company and that the use thereof on all papers or documents to which it has been heretofore affixed by order of the board, be and the same is hereby ratified, approved and confirmed. And on motion, duly seconded the board adjourned sine die.

[SEAL.]

(Signed)

C. H. PRIOR, *Secretary*.

Stockholders' Meeting June 20, 1882 (Page 37).

Pursuant to adjournment the stockholders met at 10:00 o'clock A. M. of this day at the Nicollet House, Minneapolis.

Present: Stockholders representing 295 shares.

The President having taken the chair, on motion duly seconded the meeting proceeded by ballot to the election of nine directors to serve for the ensuing year and until their successors are elected and qualified.

The Secretary and Mr. P. M. Myers were appointed tellers to receive and count the votes.

And a ballot being taken the tellers reported that J. A. Chandler, J. H. Hiland, S. S. Merrill, J. A. Monroe, P. M. Myers, John S. Pillsbury, C. H. Prior, W. H. Truesdale, and E. W. Winter had each received 295 votes being all the votes cast at said election. Whereupon the President declared the above named gentlemen duly elected directors of the company for the ensuing year.

On motion of Mr. Porter seconded by Mr. Merrill, the thanks of the stockholders were tendered to Mr. J. B. Bassett for his services to the company.

On motion duly seconded the following resolution was on a stock vote unanimously adopted. 295 shares voting in favor of its adoption and no votes opposed.

Resolved, that all the acts and doings of the board of directors from the organization of the company to the present time, as set forth in the record book of the company, be and they are hereby in all things ratified, approved and confirmed, as the acts and doings of this corporation.

And on motion duly seconded the meeting adjourned sine die.

(Signed)

C. H. PRIOR, *Secretary*.

323

PL'T'F "G."

6.

Chicago, Milwaukee & St. Paul Ry. Co.

NEW YORK, MONDAY, 9th Aug., 1880—2 p. m.

The Board of Directors met at the call of the President.

The Vice President submitted an agreement and supplemental agreement between the Minneapolis Eastern Ry. Co. the Chicago, Milwaukee & St. Paul Ry. Co., and the Chicago, St. Paul and Minneapolis Ry. Co., relative to the building of tracks in Minneapolis to the Mills, etc. About \$150,000.00 bonds of the first said company have been issued, of which this company have taken about \$75,000.00.

The Committee approved the agreements and ordered them to be copied into the contract book.

On Motion of Mr. Wadsworth seconded by Mr. Dickey, it was resolved that the said agreement and supplemental agreement between this company and the Minneapolis Eastern Ry. Co. and the Chicago St. Paul and Minneapolis Ry. Co. and which is entered in the contract book be and the same is hereby ratified and approved.

324

PL'T'F "H."

(Page 38.)

Copy.

By-laws of the Minneapolis Eastern Railway Company, Adopted June 20th, 1882.

Article 1.

The annual meeting of the stockholders shall be held at the City of Minneapolis on the second Monday in June of each year, and

may be adjourned from time to time until their business is completed.

Special meetings of the stockholders may be called by the board of directors whenever in their judgment circumstances require it.

A written or printed notice of the time and place of any meeting of the stockholders, shall be mailed to each stockholder, whose address may appear upon the records of the Company, at least ten days before the time of such meeting.

At all meetings of the stockholders, the President shall preside, and in his absence, the meeting shall appoint a presiding officer.

The Secretary of the company, if present, shall be secretary of the meeting, and in his absence, the meeting shall appoint a secretary.

Every stockholder shall be entitled to one vote in person or by proxy for each share of stock standing in his name.

The proceedings of all stockholders' meetings shall be certified by the President and Secretary thereof, and shall be entered on the records of the company.

Article 2.

At the annual meetings, the stockholders shall elect by ballot, from among their number, a board of nine directors to hold office until the next annual election, or until their successors are elected and qualified, and the directors shall have power to fill vacancies in their number occasioned by death, resignation, or otherwise.

But in case the annual meeting in any year should not be held on the day above mentioned, then the election of the directors may take place at a special meeting of the stockholders called for that purpose, as provided in Article 1.

325

Article 3.

The board of directors shall at their first meeting after the regular meeting of the stockholders, or as soon as quorum can be convened, proceed to organize by the election of a President, a Vice-President, Secretary, Treasurer and Auditor, who shall hold office for one year, or until their successors are elected or appointed.

The office of Secretary and Treasurer may be held by same person.

Article 4.

The board of directors shall have the control, management and direction of the company, shall appoint its officers and agents, determine their duties and fix their compensation.

Article 5.

A majority of the directors shall constitute a quorum for the transaction of business, and in the absence of a quorum, those present may adjourn to such period or periods as they may fix.

Article 6.

Meetings of the board of directors shall be held at the call of the President or of any three of the directors, at such time and place as may be designated in the call, provided however, that a notice stating the time and place of the meeting shall be mailed to each director at least five days prior thereto, and provided that five affirmative votes shall be required to adopt any measure.

Article 7.

These By-laws may be amended or altered at any meeting of the board of directors by the vote of the majority of the whole board.

At a meeting of the directors held September 3d, 1887, Mr. Howe offered the following resolution, which was unanimously adopted:

Resolved, that the following be adopted as Article 8 of the By-laws of this Company:

Article 8.

The board shall appoint a committee of two members, who shall be called the Managing Committee, who shall hold their office until their successors are elected and qualified. The said Managing Committee shall have the management and control of all operations of the Company, subject to the board, and shall audit and approve all accounts before payment, and shall discharge such other duties as may be imposed upon it by the board.

At a meeting of the directors held June 8th, 1908, the following resolution was unanimously adopted:

That Article 1 of the By-laws be amended as follows:

Article 1.

The annual meeting of the stockholders shall after the year 1908 be held in the City of Minneapolis on the first Monday in September of each year, and may be adjourned from time to time until their business is completed.

At a meeting of the directors held September 15, 1914, the following resolution was unanimously adopted:

That Article 1 of the By-laws be amended as follows:

Article 1.

The annual meeting of the stockholders shall after the year 1914 be held at the City of Minneapolis on Tuesday preceding the third Wednesday in September of each year, and may be adjourned from time to time until their business is completed.

Minutes of Meetings at which Any Amendments to the By-laws of the Minneapolis Eastern Railway Company were Passed.

Meeting June 13th, 1887.

At the time and place appointed for the annual meeting of the stockholders of said company appeared the following named stockholders: Charles W. Case, J. M. Whitman, J. D. Howe, Jas. H. Howe, J. A. Chandler.

Charles W. Case was chosen President pro tem.; the President and Vice President being absent and Mr. W. H. Norris was appointed Secretary of the meeting.

It was thereupon ascertained and declared in Committee of the whole that the stock represented in person or by proxy was as follows:

J. M. Whitman.....	one share
J. D. Howe.....	one share
Jas. H. Howe, by proxy.....	145 shares
C. W. Case, in person.....	one share
C. W. Case, as proxy for R. Miller and for R. Miller, Trustee	147 shares
J. A. Chandler.....	one share

Total representation present 296 shares, leaving unrepresented,

P. M. Myers	one share
J. S. Pillsbury.....	one share
J. Truman Clark.....	one share
E. W. Winter.....	one share

Total number of shares being 300.

The minutes of the last annual meeting of stockholders began June 14, 1886—adjourned to June 16, 1886, were read and approved.

The stockholders thereupon proceeded to the election of nine (9) directors for the ensuing year.

Upon motion of Mr. John D. Howe unanimously carried, the Secretary was instructed to cast the vote of the meeting for the following named gentlemen as directors for the ensuing year: John S. Pillsbury, Roswell Miller, J. A. Chandler, P. M. Myers, Charles W. Case, E. W. Winter, J. M. Whitman, J. Truman Clarke, Jas. H. Howe. The ballot was cast and accordingly, and the aforesaid nominees were thereupon declared unanimously elected, directors of the Minneapolis Eastern Railway Company for the ensuing year or until their successors should be duly elected and qualified. The stockholders thereupon adjourned subject to the call of the President.

W. H. NORRIS,
Secretary Stockholders' Meeting.

Immediately after the adjournment of the foregoing stockholders' meeting the directors convened at the same place but on account of the directors present not constituting a quorum, meeting was thereupon adjourned to Saturday June 18, 1887, at 10:30 A. M. at the office of W. H. Norris.

On June 18, 1887, at 10:30 A. M. owing to directors appearing not constituting a quorum, meeting was further adjourned until July 2, 1887, at the office of W. H. Norris.

July 2, 1887.—Pursuant to adjournment *net* Messrs. Whitman, Howe, Case and Chandler and after informal consideration of proposed adjustment with the Minneapolis Union Railway Company and J. B. Bassett adjourned for want of quorum until Saturday July 23, 1887.

July 23, 1887.—For want of quorum, meeting adjourned until July 27, 1887.

July 27, 1887.—For want of quorum, meeting adjourned until the 10th day of August, 1887.

328 August 10, 1887.—For want of quorum, meeting adjourned until Tuesday August 23, 1887.

August 23, 1887.—For want of quorum, meeting adjourned until Sept. 3, 1887.

September 3, 1887.—Pursuant to the last above noted adjournment appeared at said office directors: John S. Pillsbury, Roswell Miller, J. A. Chandler, Charles W. Case, E. W. Winter, James Howe and W. H. Norris, Attorney.

John S. Pillsbury, President, holding over from the election of 1886 in the chair, W. H. Norris acting as Secretary. The minutes of the directors' meeting of June 16th, 1886 and of the directors' attempted meeting of June 13, 1887 and of the several adjournments thereof on the day last mentioned, and on the 18th day of June, 1887, and on the 2nd, 23rd, and 27th days of July, 1887 and on the 10th and 23rd days of August, 1887, respectively, were severally read and approved. The resignation of director J. M. Whitman to take effect upon its acceptance was presented by Mr. Winter and duly accepted. Thereupon, Mr. F. B. Clarke was unanimously chosen director to fill the vacancy and for the unexpired term of Mr. Whitman. On motion of Mr. Winter, seconded by Mr. Howe, the acting Secretary was directed to cast the vote of the board for the following list of officers to serve until the next annual meeting of the stockholders or until their successors could be elected or appointed: John S. Pillsbury, President; Roswell Miller, Vice-President; Charles W. Case, Secretary and Treasurer; L. A. Robinson, Auditor, who, the vote having been so cast, were declared unanimously elected.

Mr. Howe thereupon offered the following resolution, which was unanimously adopted.

Resolved that the following be adopted as Article 8 of the By Laws of this Company.

Article 8.

The Board shall appoint a committee of two members, who shall be called the Managing Committee, who shall hold their office until

their successors are elected and qualified. The said Managing Committee shall have the management and control of all operations of the Company, subject to the Board and shall audit and approve all accounts before payment, and shall discharge such other duties as may be imposed upon it by the Board.

Messrs. Winter and Case were thereupon by unanimous vote appointed Managing Committee under the aforesaid Article 8.

The following resolution was then unanimously adopted:

Resolved that the appointment of Charles W. Case as Secretary and Treasurer pro tem. in place of C. H. Prior resigned, made by Directors Winter and Myers on or about September 14th, 1886, and the action of said Chas. W. Case as such Treasurer pro tem. in countersigning stock certificates Nos. 28, 29 and 30 on June 3rd, 1887, and Nos. 31 and 32 on June 13th, 1887, be and are hereby respectively approved.

Mr. Norris, the Attorney, presented his report under the resolution of June, 1886, requiring him to examine into the validity of the organization of this company, and to determine what, if any, curative legislation or proceedings are requisite, and what steps, if any, should be taken to avoid personal liability of the stockholders; Which report was received and placed on file.

The Attorney also reported the progress of the Jordan-Connelly case, about to be appealed by the plaintiff from an order of the District Court denying new trial after dismissal.

It was recommended that the Secretary record in the minute book the articles of Association and their Amendments, with a note of the filing, recording and publication thereof, respectively.

The matter of percentage taxes upon earnings, under Chapter 11 of the Laws of 1887 was referred to the Secretary and the Auditor.

329 Messrs. James H. Howe and W. H. Norris were appointed a committee with authority to adjust with J. B. Bassett as to boundary line, and to negotiate with the representatives of the Minneapolis Union Railway Company for an adjustment and settlement of all pending matters of difference.

The report on stock issues, required by Chapter 12 of the laws of 1887 to be made and filed in the Month of July in each year, was exhibited and executed by the President and Secretary, stating excuse for delay.

The Attorney reported that he had taken an appeal from the \$100 switching charge order of the Railroad and Warehouse Commission.

The meeting of the Directors then adjourned sine die.

C. W. CASE, *Secretary*.

_____,
Acting Secretary.

Stockholders' Meeting June 8, 1908.

Immediately after the adjournment of the stockholders of the Minneapolis Eastern Railway Company above recorded, the newly

elected directors thereof assembled at the same place. Present: F. A. Chamberlain, President, in the chair, Thomas Wilson, A. W. Tremholm, T. A. Polleys, J. H. Foster, J. T. Clarke, W. H. Norris. The meeting having been called to order, the minutes of the last meeting of directors were read and approved. Upon motion duly made and seconded the Secretary was unanimously instructed to cast the vote of the board for the following officials for the ensuing year to wit: F. A. Chamberlain as President, A. J. Earling, as Vice President, J. H. Foster as Secretary and Treasurer, L. A. Robinson as Auditor, A. W. Tremholm and J. H. Foster as Managing Committee. The vote was so cast and the said persons were declared duly elected to said offices respectively. The Secretary and Treasurer thereupon presented a statement of the Income Account of the Company for the past year, which is pasted on Page 195 of this record book. He also presented a balance sheet from the general ledger to May 31, 1908, which is pasted to Page 194 of this record book. Such statement and balance sheet were respectively considered, adopted and directed to be spread upon the minutes. It was further ordered that a copy of such statement be sent to the C. M. & St. P. Ry. Co., and to the C. St. P. M. & O. Ry. Co., respectively. Upon motion of Thomas Wilson, duly seconded it was unanimously resolved that the fiscal year of this company shall hereafter terminate on the 30th day of June. Upon further motion of Thomas Wilson, duly seconded, it was unanimously resolved that Article 1 of the By Laws be amended so as to read as follows:

Article 1.

The annual meeting of the stockholders shall after the year 1908 be held at the City of Minneapolis on the first Monday in September of each year, and may be adjourned from time to time until their business is completed.

On motion of J. T. Clark, duly seconded, Messrs. F. A. Chamberlain, L. A. Robinson and E. D. Sewall were unanimously appointed a committee to negotiate for the issue of mortgage bonds to take up the outstanding mortgage bonds of this company, which will mature January 1st, 1909. The meeting of the Board of Directors thereupon adjourned without date.

J. H. FOSTER, *Secretary*.

Extract from Stockholders' Meeting Held September 15, 1914.

"Mr. Foster called attention to the inconvenience arising from the present date for the annual meeting falling upon Labor Day, and on his motion, seconded by Mr. Polleys, it was unanimously resolved that Article One (1) of the By Laws as amended June 8, 1908, be further amended so as to read as follows:

330 Article One (1). The annual meeting of the stockholders shall, after the year 1914, be held at the City of Minneapolis on Tuesday preceding the third Wednesday in September of each year, and may be adjourned from time to time until their business is completed.

Extract from Directors' Meeting of the Minneapolis Eastern Railway Company, Held June 13th, 1906, at Which Additional Capital Stock is Authorized.

"Thomas Wilson offered the following preamble and resolution, which was seconded by A. W. Trenholm; whereas this company has invested in its property the sum of Two Hundred Seventy Five Thousand, One Hundred and Thirty and Ninety Nine One-Hundredths Dollars (\$275,130.99), and whereas for One Hundred and Fifty Thousand Dollars (\$150,000.00) of that sum bonds have been issued and Thirty Thousand Dollars (\$30,000.00) of stock has been issued—therefore resolved that stock be issued for Ninety Five Thousand Dollars (\$95,000.00) of the remainder of such investment, and that certificate- therefore be issued as follows: for Forty Seven Thousand Five Hundred Dollars (\$47,500.00) thereof to Mr. Marvin Hewitt as Trustee and for Forty Seven Thousand Five Hundred Dollars, (\$47,500.00) thereof to Mr. A. J. Earling as Trustee; the vote thereon was as follows: Ayes F. A. Chamberlain, A. W. Trenholm, J. T. Clark, Thomas Wilson, H. B. Earling, E. E. Woodman, E. D. Sewall, W. H. Norris declining to vote. The said resolution was thereupon declared adopted.

Copy of Resolution Adopted at Meeting of Directors of C., St. P., M. & O. Ry. Co. Held October 16th, 1908.

(Record 3, Page 219.)

On motion of Mr. Humbird, seconded by Mr. Whitman, the following resolution was adopted:

Whereas, on the first day of January, 1879, the Minneapolis Eastern Railway Company made its first mortgage bonds in the sum of one hundred and fifty thousand dollars, maturing on the first day of January, 1909, and, to secure the payment of such bonds, together with the interest thereon, executed its certain indenture of mortgage creating a lien upon its railroad property and bearing date the said first day of January, 1879; and,

Whereas, the payment of the principal and interest of the said bonds was guaranteed by the Chicago, St. Paul & Minneapolis Railway Company and the Chicago, Milwaukee & St. Paul Railway Company severally, by each one half thereof; and,

Whereas, the said Minneapolis Eastern Railway Company now proposes to redeem the said bonds by the issue of other bonds in same amount secured by a like mortgage upon its property and bearing interest at a rate not exceeding five per centum per annum,

Resolved, That if the said Minneapolis Eastern Railway Company

shall so issue its new bonds in the sum of one hundred and fifty thousand dollars to redeem its said issue maturing on the first day of January, 1909, that this Company shall join with the said Chicago, Milwaukee & St. Paul Railway Company in each severally guaranteeing the payment of one half of the principal amount of said bonds, together with the interest thereon, and the Treasurer of this Company is authorized to execute, under the seal of this Company such guaranty upon each of seventy-five of said bonds in the sum of one thousand dollars each.

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DEF. 6.

Minneapolis Eastern Railway Company.

Results of Operation.

Years Ended June 30, 1914 and 1915.

	Year ended June 30, 1914.	Year ended June 30, 1915.	Increase or Decrease.	
Operating Revenues	\$72,676.57	\$63,533.72	\$9,142.85	Dec.
Operating Expenses	\$35,828.22	\$33,821.10	\$2,007.12	Dec.
Taxes	3,925.78	3,518.18	407.60	Dec.
Hire of Equipment	37.40	452.45	415.05	Inc.
Miscellaneous Rents	180.00	150.00	30.00	Dec.
Total Cost of Operation...	\$39,971.40	\$37,941.73	\$2,029.67	Dec.
Net Revenue	\$32,705.17	\$25,591.99	\$7,113.18	Dec.
Operating Ratio	55.00%	59.72%	4.72	Inc.

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EX. 6A.

Statement of "Flour Shipments from the Minneapolis Eastern Ry. to the Various Roads in Minneapolis from July 1st, 1914, to June 30, 1915, Inc.

Road to	No. of cars.
Chicago Burl. & Quincy Ry.....	2,043
Mpls. & St. Louis R. R.....	974
Chicago Gr. Western R. R.....	489
Northern Pacific Ry.....	859
"Soo" Line	2,310
Chicago, Milw. & St. P. Ry.....	2,631
Chicago, R. I. & Pac. Ry.....	413
Chicago, St. Paul, Mpls. & O. Ry.....	2,549
Great Northern Ry.....	948
Total	13,216

Correct,

T. H. BURDICK.

[Stamp:] Office Minneapolis Eastern Ry. Co., Minneapolis, Minn.
9/21/15.

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DEF. 7.

Extract from Directors' Meeting of the Minneapolis Eastern Railway Company Held June 28, 1905.

"The subject of a cash dividend upon the stock of the company was discussed and the following resolution was offered by Mr. Clark, seconded by Mr. Woodman and unanimously adopted.

Whereas, this company has invested in its property the sum \$275,130.99; and whereas for \$150,000.00 of that sum bonds have been issued: now therefore, resolved, that on the remainder of the stock of the company to wit: \$125,130.99, a dividend of eight (8) percent be and is hereby declared, and that such dividend be immediately paid to the shareholders in proportion to their respective holding as shown by the stock register."

E. D. SEWALL, *Secretary.*

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PL'T'F EX. "N."

Extracts from Minutes of Meeting at Which Any Mortgage Bonds Were Authorized.

Board of Directors' Meeting Held January 27, 1879.

"Director J. A. Chandler, then offered the following resolution and moved its adoption—viz: resolved by the Minneapolis Eastern Railway Company that the bonds of this company to the aggregate amount of One Hundred and Fifty Thousand Dollars (\$150,000) be and the same are hereby ordered to be issued, signed by the president and secretary of this company or so much thereof as may be necessary to pay for right of way and construction and rolling stock and equipment of the railway of this company and to reimburse for the moneys heretofore advanced to this company for said purposes, the said bonds to — issued in denominations of One Thousand Dollars (\$1,000) each bearing date the first day of January A. D. 1879 and payable on the first day of January A. D. 1909 to Sherburne S. Merrill or to William H. Ferry or bearer at the office or agency of this company in the City of New York with interest thereon from the first day of January A. D. 1879 at the rate of seven per cent per annum payable semi-annually on the first days of January and July in each year to be evidenced by coupons annexed to said bonds and signed by the Secretary, the said bonds to be signed and issued to the Treasurer of this company and to be negotiated only so fast as necessary for said purposes at not less than eighty percent of their par value, and resolved further that a deed of trust or mortgage be executed by this company, signed by its President and Secretary to the said Sherburne S. Merrill, and William H. Ferry, in trust in the said sum of One Hundred and Fifty

Thousand Dollars, and conveying all and singular the railroad of this company now being constructed from a junction with the St. Paul and Pacific Railroad to a point opposite the Palisade Mill in the City of Minneapolis all in the County of Hennepin and State of Minnesota, including all the railways, ways, rights of way, depot grounds, and other lands for rights of way, or for railroad uses and other property as described in the printed blank now prepared for such purposes, for the security of the payment of said bond and interest. Which resolution was unanimously adopted."

Minutes of Directors' Meeting of the Minneapolis Eastern Railway Company Held November 27th, 1908.

Pursuant to the foregoing call and due notice thereof, acknowledged by all Directors.

A meeting of the Directors of the Minneapolis Eastern Railway Company convened at the time and place last above mentioned and there were found to be present F. A. Chamberlain, President in the chair and Directors Wilson, Trenholm, Clark, Pollys, Norris and Foster, the last named being Secretary.

The meeting having been called to order, the committee appointed last June, with reference to a new trust mortgage and bonds reported as follows:

To the Board of Directors of the Minneapolis Eastern Railway Company:

The undersigned, your committee appointed on the eighth day of June last to negotiate for the issue of new bonds, secured by trust mortgage, for the purpose of retiring the outstanding bonds of your company, similarly secured, which will mature on the first day of January next, having duly considered the subject, and having conferred with representatives of the Chicago, Milwaukee and St. Paul Railway Company and of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, recommended the adoption of the resolution following:

Resolution.

Resolved, by the Board of Directors of the Minneapolis Eastern Railway Company, duly convened, that for the purpose of paying and extinguishing the bonds of said company now outstanding, to the amount of One Hundred and Fifty Thousand Dollars 337 (\$150,000.00) principal, about to mature January 1st, 1909 and of causing to be discharged of record the trust mortgage whereby the same are secured, said company borrow the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00), execute its bonds therefor, secure the payment thereof by trust mortgage of all its property heretofore mortgaged and of the income thereof, and issue such last mentioned bonds in lieu and in payment of said outstanding bonds:

That such bonds now to be issued and secured shall be of the de-

nomination of One Thousand Dollars (\$1,000.00) each, bear date January 1st, 1909, mature Thirty (30) years thereafter, be payable (principal and interest) at the office or agency of said company in the City of Minneapolis, Minnesota, be numbered consecutively from One (1) to One Hundred and Fifty (150) both inclusive, bear interest at the rate of Four and one-half percent ($4\frac{1}{2}\%$) per annum, payable semi-annually on the first days of July and January respectively in each year, as per appropriate interest coupons to be thereto attached, and be equally secured by a mortgage in trust to the Northwestern Trust Company of St. Paul, Minnesota, as trustee:

That the proper officers of said company execute such trust mortgage and the bonds to be thereby secured, in the respective forms herewith submitted:

And that your Committee therewith, with all convenient speed, proceed to do whatever may be necessary or proper in order to effectuate the prompt payment and cancellation of the outstanding bonds and the discharge of record of the mortgage whereby they have been secured.

(Signed)

F. A. CHAMBERLAIN,
E. D. SEWALL,
L. A. ROBINSON,

Committee.

The indenture made the first day of January, 1909 by and between the Minneapolis Eastern Railway Company, a corporation organized and existing under the general laws of the State of Minnesota, having its principal office in the City of Minneapolis, Hennepin County, in said State, and hereinafter styled the "Railway Company" party of the first part and the Northwestern Trust Company a corporation likewise organized and existing, having its principal office in the city of St. Paul, Ramsey County, in said state, and hereinafter styled the "Trustee," party of the second part, Witnesseth as follows:—

Whereas said Railway Company is the owner and in possession of a certain main line of railroad in said city of Minneapolis extending from the Palisade Mill, at the foot of Eighth Avenue South, to switch connections with the tracks of the Great Northern Railway Company near Third Avenue North, and of a certain branch line of railroad extending from a switch connection with said main line through Blocks eighteen (18) seventeen (17) and fractional block sixteen (16) of the "Town of Minneapolis," and of drives, side tracks and spur tracks connected by switches with said main line and branch line respectively, all of which said lines and tracks are situated upon the West side of the Mississippi River, and are subject to the *lieu* of a certain trust mortgage executed by said Railway Company and in favor of Sherburn S. Merrill and William H. Perry as Trustees, dated January 1, 1879, and recorded in the office of the Register of Deeds for said Hennepin County, on the 24th day of February, 1879, in Book 54 of Mortgages, beginning at Page 377, all the bonds secured by which mortgage, amounting to One Hundred and Fifty Thousand Dollars (\$150,000) principal, are outstanding unpaid and are payable at the date hereof:

And whereas the Railway Company is by the laws of said state authorized to borrow money, to execute its bonds therefor, and to secure payment thereof by Mortgage or pledge of its property, or income, or both, and to issue such bonds, in lieu and in payment of outstanding bonds: And it is necessary for the Railway Company, and it desires, and has determined so to raise One Hundred and Fifty Thousand Dollars (\$150,000) and so to secure payment thereof, for the purpose of paying and extinguishing all such outstanding 338 bonds, and of causing the above described Trust Mortgage to be discharged of record; and has further determined that said bonds now to be issued and hereby secured, shall be of the denomination of One Thousand Dollars, (\$1,000), each shall bear date Jan. 1, 1909, mature Thirty (30) years thereafter, be payable, principal and interest, at the office or agency of the Railway Company in said City of Minneapolis, bear interest at the rate of Four and one-half ($4\frac{1}{2}$) per cent per annum payable semi-annually on the first days of July and January respectively in each year, as per appropriate interest coupons to be thereto attached, be numbered consecutively from One (1) to One Hundred and Fifty (150) both inclusive, be equally secured by this present mortgage in trust, and be all of like tenor and in the form following: that is to say:

UNITED STATES OF AMERICA,
State of Minnesota:

The Minneapolis Eastern Railway Company.

Refund Mortgage Bond, Bearing $4\frac{1}{2}$ Per Cent Interest.

Know all men by these Presents, that the Minneapolis Eastern Railway Company is indebted to the Northern Trust Company, of St. Paul, Minnesota or to the bearer hereof, in the sum of One Thousand Dollars (\$1000), which the said Railway Company promises to pay to the said Northwestern Trust Company, or to the bearer hereof, on the first day of January in the year of our Lord One Thousand Nine Hundred and Thirty-nine at the office or agency of said Railway Company in the City of Minneapolis, Minnesota, with interest thereon from the first day of January, A. D. 1909, at the rate of Four and one-half ($4\frac{1}{2}$) per cent per annum, payable semi-annually on the first days of July and January respectively in each year, on presentation and surrender of the annexed coupons, as they shall severally become due.

This bond is one of an issue amounting in the aggregate to One Hundred and Fifty Thousand Dollars (\$150,000) and consisting of One Hundred and Fifty bonds, each for One Thousand Dollars (\$1000), numbered consecutively from One (1) to One Hundred and Fifty (150) both inclusive; all of which bonds are of like tenor and effect, and are equally secured by a trust mortgage executed by the said Minneapolis Eastern Railway Company and duly delivered to the said Northwestern Trust Company, conveying all the main

line, branch line, side tracks and spur tracks of said Railway Company therein described, and the equipments, appurtenances and franchises thereunto belonging.

This bond shall not become obligatory until it shall have been authenticated by a certificate hereto subjoined and duly subscribed by the Trustee.

In Witness Whereof, the said Railway Company has caused its corporate seal to be hereto affixed and this Bond to be subscribed by its President and Secretary, and has also caused the coupons hereto annexed to be subscribed by its Secretary, on this first day of January, A. D. 1909.

[CORPORATE SEAL.]

_____, *President.*
_____, *Secretary.*

It is hereby certified that this Bond is one of the Bonds secured by the above mentioned Trust Mortgage, which is dated the first day of January A. D. 1909.

[Corporate Seal of Trustee.]

NORTHWESTERN TRUST
COMPANY,

By _____, *President.*

Now therefore, in order to secure the payment, principal and interest, of each and all of said Bonds to be issued as hereinbefore mentioned, and every part thereof, as the same shall become payable according to the tenor of said Bonds, and also the performance of said Railway Company to all covenants and conditions in the said Bonds

and in This Indenture expressed, the said Railway Company
339 hath granted, bargained, sold, released, conveyed and confirmed and by these presents doth grant, bargain, sell, release, convey and confirm unto the said Trustee and its successor, in trust for whomsoever may from time to time be the holders of the said Bonds to be hereby secured, all its said main line of railroad in said City of Minneapolis, extending from the said Palisade Mill, at the foot of said Eighth Avenue South, to switch connections with the tracks of the said Great Northern Railway near said Third Avenue North, and all its said branch line extending from a switch connection with said main line, through said Blocks Eighteen (18) Seventeen (17) and fractional Block Sixteen (16), of said Town of Minneapolis, and all and singular the said side tracks and spur tracks connected by switches with said main line and branch line respectively, all situate upon the west side of the Mississippi River; including all rights of way, depot grounds, and other lands for rights of way or other railroad uses, all tracks, track materials, bridges, viaducts, trestles, culverts, fences and other structures, all depots, station houses, engine houses, car houses, freight houses, wood houses, shops and other buildings, whether now held or hereafter acquired for use in connection with the hereinbefore described lines of railroad, side tracks and spur tracks; including also all locomotives, tenders, cars and other rolling stock or equipment, and all ma-

chinery, tools, implements, fuel and materials for constructing, maintaining, operating, repairing or replacing the said lines of railroad, side tracks and spur tracks, or any part thereof, or any of its equipment or appurtenances, whether now held or hereafter acquired; all of which things are hereby declared to be appurtenances and fixtures of the said lines of railroad and tracks; also all franchises connected with or relating to the said lines of railroad, or the construction, maintenance and use thereof, whether now held or hereafter acquired by the said Railway Company, not excepting the franchise to be a corporation; together with all and singular the covenants, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainders, tolls, income, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said Railway Company of, in and to the same and any and every part thereof, with the appurtenances.

To have and to hold all the above mentioned and described property and premises unto the said trustee and to its successors in trust, to its and there own proper use and benefit forever; in trust nevertheless, to and for the uses and purposes and subject to the powers hereinafter declared, granted or expressed, to wit;

Article 1.

The Railway Company shall and will pay the principal and interest of said bonds to the several holders or owners thereof, when and as the same shall become due and payable, according to the tenor and affect of the said bonds and coupons.

Article 2.

Until default shall be made in the payment of the principal or interest, or some part thereof, of the said bonds or some one of them, or until default shall be made or have occurred in respect to some other things by these presents required to be by the Railway Company observed, performed or kept, the said Railway Company shall be suffered and permitted to possess, manage, operate and enjoy the said lines of railroad, side tracks, spur tracks, equipments, appurtenances, property and franchises aforesaid, and to take and use the rents, revenues, incomes, profits, tolls and issues thereof in the same manner and with the same effect as if this mortgage had not been made.

Article 3.

If default shall be made in the payment of any interest or any of the said bonds to be hereby secured, according to the tenor of the coupons thereto annexed, or in any other requirements hereof to be by the Railway Company observed, performed or kept, and if such default shall continue for a period of six months, it shall be lawful for the said trustee, personally or by attorneys or agents to

340 enter into and upon all and singular the property and premises hereby conveyed or intended so to be, and each and every part thereof, and to have, hold and use the same, and by its attorneys, superintendents, managers, receivers or servants, or other agents, to operate the said lines of railroad, side tracks and spur tracks, and to exercise the franchises pertaining thereto, and to make from time to time all such repairs and replacements, and such useful alterations, additions and improvements thereto as to the trustee may seem to be judicious; and *the* collect and receive all tolls, freights, incomes, rents, issues and profits of the same and of every part thereof; and after deducting the expenses of operating and conducting the business and of all such repairs, replacements, alterations, additions and improvements, and all payments which may have been made for taxes, assessments, charges or liens prior or paramount to the lien of these presents upon the said premises or any part thereof, as well as just compensation for its own services and for services of such Attorneys and Counsel as may have been by it employed, to apply the monies arising as aforesaid to the payment of interest in the order in which such interest shall have become due, ratably, to the persons holding the coupons evidencing the right to such interest; and when all such payments shall have been so made, in full, if no sale of the mortgage property or premises shall have been made, the trustee, after making such provisions as to it may seem advisable for any half year's interest next to fall due, shall restore unto the said Railway Company, its successors or assigns, the possession and use of the property and premises hereby conveyed; Provided, that if any such default as hereinbefore specified be subsequently made, such restoration shall not, nor shall any previous entry, be construed to exhaust or in any manner impair any power of entry or sale or any other power hereby granted to or conferred upon the said trustee.

Article 4.

If default shall be made as aforesaid and be continued as aforesaid or if default shall be made in the payment of any principal of any of the said bonds it shall likewise be lawful for the said trustee, after entry as aforesaid, or without such entry, to sell and dispose of all and singular the property and premises hereby conveyed or intended so to be, at public auction in the said city of Minneapolis and at such time as said trustee may appoint, after having first given notice of the time and place of such sale by advertisements, published not less than three times a week for twelve successive weeks next before the date therein appointed for such sale, in one or more newspapers in each of the Cities of New York, Chicago and Minneapolis or to adjourn such sale from time to time in its discretion by public proclamation at the appointed place of sale; and, if so adjourning to make such sale at the time to which the same may have been adjourned, without other or further notice; and to make and deliver to the purchaser or purchasers thereof good and sufficient deed in the law for the same in fee simple; which sale, made as aforesaid shall be a perpetual bar both in law and equity against the said Railway Com-

pany and all other persons lawfully claiming or to claim the said property and premises or any part thereof, by, from, through or under the said railway company, subject however to the right of redemption, if any there be; and after deducting from the proceeds of such sale just allowance for all expenses of the said sale, including attorneys' and counsel fees, and other expenses, advances or liabilities, which may have been made or incurred by the said trustee in maintaining and operating the said property and premises, in managing the business thereof while in possession, and in arranging for and completing said sale, and all payments which may have been made by the trustee for taxes or assessments and for charges and liens prior or paramount to the lien of these presents on the said premises or any part thereof, as well as compensation for the services of the trustee, to apply the residue of such proceeds to the payment of the principal of such of the bonds hereby secured as may be at that time unpaid, whether or not theretofore due, and of the interest which shall at that time have accrued on the said principal and be unpaid; without discrimination or preference, but ratably to the aggregate

341 amount of such unpaid principal and interest; and, if after the satisfaction of all thereof, a surplus of such proceeds shall still remain, to pay over such surplus to the said Railway Company or to tender the same as any Court of competent jurisdiction shall in such case order. And it is hereby declared that the receipt or receipts of the said Trustee shall be a sufficient discharge to the purchaser or purchasers of the property and premises for his or their purchase money, and that such purchaser or purchasers, or his or their heirs, executors or administrators, shall not after payment thereof and having such receipt, be bound to see to its application upon or for the trusts or purposes of these presents, or to be in any manner whatsoever answerable for any loss, misapplication or non-application of such purchase money or any part thereof, or be obliged to inquire into the necessity, expediency or authority for any such sale.

Article 5.

At any sale of the aforesaid property and premises, whether made by virtue of the power herein granted, or by judicial authority, the Trustee may in its discretion bid for and purchase, or cause to be bidden for and purchased, the property and premises so sold, in behalf of the holders of the bonds secured by this instrument and then outstanding, in the proportion of the then respective interests of such bondholders, at a price not exceeding the whole amount of such bonds then outstanding with the unpaid interest accrued thereon and the proper expenses and charges of the Trustee then unpaid.

Article 6.

If default shall be made in the payment of any half year's interest on any of the aforesaid bonds at the time and in the manner provided in the coupon or coupons issued therewith, the said coupon or coupons having been presented and payment of the interest therein

specified having been demanded, and if such default shall continue for the period of six months after the said coupon or coupons shall have become due and payable, then and thereupon the principal of all the bonds secured hereby shall at the election of the Trustee become immediately due and payable, anything contained in the said bonds or herein to the contrary notwithstanding; but a majority in interest of the holders of the said bonds may, by an instrument in writing signed by such majority before the interest so in arrear shall be paid, instruct the Trustee to declare the said principal to be due, or to waive the right so to declare it on such terms and conditions as such majority shall deem proper, or they may annul or reverse such election of the Trustee; Provided that no such action of the Trustee or bondholders shall extend to or be taken to affect any subsequent default or to impair any right resulting therefrom.

Article 7.

The Trustee shall have full power in its discretion, upon the written request of the Railway Company to convey by way of release, or otherwise, to any person or persons for that purpose designated by the Railway Company, any lands acquired or held for the purposes of station, depots, shops or other buildings, and shall have power to convey, as aforesaid, on like request any other lands or property which in the judgement of the Trustee shall not be necessary for use in connection with the property and premises hereby mortgaged; and also to convey, as aforesaid on like request, any lands no longer occupied by any tracks which may become disused by reason of a change of the location of any station house, depot, shop, or other building, connected with the lines of Railroad and tracks hereby mortgaged, and any other such land occupied by a track or tracks and adjacent to such station house or other buildings, as the said Railway Company may deem it expedient to disuse or abandon by reason of such change, and to consent to any such change, and to any other changes in the location of tracks, depots or other buildings, which shall in the judgement of the Trustee have become expedient; and to make and deliver the conveyances necessary to carry the same into effect; but any lands which may be acquired for permanent use in substitution for any so released shall be conveyed to the Trustee upon the trusts of these presents; the trustee shall also have

342 full power to allow the said Railway Company from time to time to dispose of such portions of the equipments, machinery and implements at any time held or acquired for the use of the said railroad, as may in the judgement of the railroad company have become unfit for such use, replacing the same by new, and conveying the new to the trustee, or otherwise making the same subject of the operation of these presents.

Article 8.

It is hereby declared and agreed that it shall be the duty of the trustee, upon any such requirition in writing as hereinafter specified to exercise the power of entry hereby granted, or the power of sale

hereby granted, or both, or to take appropriate proceedings in equity or at law to enforce the rights of the bond holders under these presents; to wit:

1. If the default be as to the interest or principal of any bond, such requisition upon the said trustee shall be by holders of not less than Twenty Five Thousand Dollars principal of the said bond; and upon such requisition and a proper identification to the trustee by the persons making the same, against the cost of expenses to be by the said trustee incurred, it shall be the duty of the trustee to enforce the rights of all the bond holders under these presents, by entry, sale or legal proceedings, as the Trustee being advised by counsel learned in the law shall deem most expedient for the interest of all holders of said bond:

2. If the default be in omission of any act or thing required by the covenant hereinafter contained for the further assuring of the title of the Trustee to any property, premises or franchises hereinbefore described, whether now possessed or hereafter required, or in the omission to comply with any other provision herein contained to be performed or kept by the said Railway Company then and in either such case the requisition shall be as aforesaid but it shall be within the discretion of the Trustee to enforce or waive the rights of the bond holders by reason of such default, subject however to the power hereby declared of a majority in interest of all the holders of said bonds, by requisition in writing signed by such majority, to instruct the said Trustee to waive such default, or, upon adequate indemnity as aforesaid, to enforce their rights by reason thereof. Provided that no action of the said Trustee or bondholders, or both, in waiving such default or otherwise, shall extend to or be taken to affect any subsequent default or to impair any rights resulting therefrom.

Article 9.

It is mutually agreed by and between the parties hereto that the word "Trustee" as used in *their* presents shall be construed to mean that the Trustee for the time being whether hereby or hereafter otherwise appointed. And it is mutually agreed by and between the parties hereto, as a condition on which the party of the second part has assented to these presents, that the said trustee shall be entitled to just compensation for all services which it may hereafter render on its trust, to be paid by the said Railway Company, or out of the income of the property and premises; and that it may for that purpose at any time apply to the Courts without notice to any person other than the Railway Company: that said Trustee, or any successor in said trust, may resign and discharge itself of the trust hereby created, by notice in writing to the said Railway Company three months before such resignation shall take effect, or by such shorter notice as the said Railway Company may in writing *except* as adequate, and upon the due execution and delivery of the conveyances hereinafter in such cases required; that the Trustee may be removed by a majority in interest of the holders of all the aforesaid bonds, by an

instrument in writing signed by such majority; that if the present Trustee or any successor in this trust hereafter appointed, shall resign or be removed as hereinbefore provided, or by a court of competent jurisdiction, or shall become incapable or unfit to act on said trust, a suc-essor or successors to such trustee may be appointed by the Chicago, St. Paul, Minneapolis and Omaha Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, by an instrument in writing signed by the President and attested by the Secretaries of the Companies lastly named, under the corporate seals thereof, such officers having been first thereto duly authorized

by resolution of their respective Board of Directors. The
343 Trustee or trustees so app-inted shall thereupon become vested with all the powers, authorities, and estate hereby granted to or conferred upon the party of the second hereto, and with all the rights and interests requisite to enable it, him or them to execute the purposes of this trust without any further assurance or conveyance so far as such effect may be lawful; and upon the resignation or removal of any Trustee, or any appointment of a successor or successors pursuant to these presents, all powers and authorities by virtue hereof, of the Trustee so resigned, removed or superseded, shall cease; and all the estate, right, title and interest in the said property and premises of any trustee so resigning removed or superseded shall wholly cease and determine; but any trustee or trustees so resigning, removed or superseded shall on the written request of the new trustee or trustees, who may be appointed immediately, execute a deed or deeds of conveyance to vest in such trustee or trustees upon the trust herein expressed all the property, premises, rights and franchises, which may be at that time held upon the said trust. Provided nevertheless that it is hereby agreed and declared that in case it shall at any time hereafter prove impracticable after reasonable exertions, to appoint in the manner hereinbefore provided a successor to any vacancy which may have happemed in said trust, application in behalf of all the holders of the bonds hereby secured, for the appointment of a new trustee, may be made by holders of such bonds to the aggregate amount of Twenty Five Thousand Dollars principal, to the circuit court of the United States for the judicial district in which the mortgaged property and premises may then be situated

And the said Railway Company, for itself and its successors, in consideration of the premises and of one dollar to it duly paid by the Trustee, the receipt whereof is hereby acknowledged hereby further covenants and agrees to and with the Trustee its successors and assigns, that to said Railway Company and its successors shall and will from time, to time and at all times hereafter, and as often as thereunto requested by the Trustee, execute, acknowledge and deliver all such further deeds conveyances and assurances in the law for the better assuring unto the said Trustee the said described property, premises, equipments and appurtenances hereinbefore mentioned or intended so to be, and all other property and things moreover which may be hereafter acquired for use in connection with the same or any part thereof, and all franchises pertaining thereto,

whether now held or hereafter acquired, as by the said Trustee or by its counsel learned in the law shall be reasonably advised, devised, or acquired.

Article 10.

These presents are upon the express condition that upon the payment in full of all the bonds to be issued hereunder and of the interest thereon, and upon the exhibit to the said Trustee, if successor or successors, of all said bonds, canceled, all estates, right, title and interest of the said Trustee, its successor or successors, under or by virtue of these presents, shall then wholly cease, determine and become void; and it or they shall, upon the request of the Railway Company, its successors or assigns, duly execute and deliver a good and sufficient release or satisfaction of this trust mortgage in due form for record.

Lastly, the said party of the second part hereby accepts the trust hereinbefore created and covenants faithfully to execute the same.

In testimony whereof, the parties hereto have caused their respective corporate seals to be affixed to these presents and the same to be subscribed by their respective Presidents and Secretaries, this first day of January A. D. 1909.

Duly witnessed.

MINNEAPOLIS EASTERN RAILWAY COMPANY.

— — —, *President.*

— — —, *Secretary.*

NORTHWESTERN TRUST COMPANY.

— — —, *President.*

— — —, *Secretary.*

344 STATE OF MINNESOTA,
County of Hennepin.

On this — day of January A. D. 1909 before me appearing Francis A. Chamberlain and James H. Foster, to me personally known, who being by me each duly sworn did say, the said Chamberlain that he is the President, and the said Foster that he is the Secretary of the corporation, the Minneapolis Eastern Railway Company; that the seal first above affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and the said Chamberlain and Foster, respectively, acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

— — —,
Notary Public, Hennepin County, Minnesota.

STATE OF MINNESOTA,

County of Ramsey, ss:

On this — day of January, A. D. 1909 before me appeared —, and —, to me personally known, who being by me each duly sworn did say, the said — that he is the President, and the said — that he is the Secretary of the corporation, the Northwestern Trust Company; that the seal secondly above affixed to the foregoing instrument is the corporate seal of the corporation last mentioned; and that said instrument was executed in behalf of the corporation last aforesaid by authority of its Board of —; and the said — and — acknowledged said instrument to be the free act and deed of the corporation, last aforesaid.

[SEAL.]

Notary Public, Ramsey County, Minnesota.

Mr. Clark thereupon moved that said report be received; which motion was seconded by Mr. Foster and was unanimously carried.

Mr. Clark thereupon moved the adoption of the resolution reported by said Committee, except its last paragraph, beginning with the words, "And that your committee therewith," which motion was seconded by Mr. Trenholm, and was unanimously carried, and so much of said resolution was thereupon declared adopted.

Judge Wilson offered the resolution following and moved its adoption: Resolved, that F. A. Chamberlain, E. D. Sewall, and L. A. Robinson, as the Committee of this Board, proceed with all convenient speed to do whatever may be necessary or proper in order to effectuate prompt payment and cancellation of the outstanding bonds of the Minneapolis Eastern Railway Company and the discharge of record of the mortgage, whereby they have been secured. Which resolution was seconded by Mr. Trenholm and was thereupon unanimously adopted.

345 Office of F. A. Chamberlain, Security Bank Building.

MINNEAPOLIS, MINNESOTA,

December 23rd, 1913—10:00 a. m.

Pursuant to call, a special meeting of the Directors of the Minneapolis Eastern Railway Company assembled at the above time and place; President F. A. Chamberlain in the chair. Also present J. T. Clark, A. W. Trenholm, J. H. Foster, W. H. Norris.

The Minutes of the Board meeting of December 10th, 1913, were read and approved.

Under the vote of the Board at the last meeting, authorizing and requesting the President to obtain bids or quotations upon the proposed issue of bonds, the President reported as follows,

MINNEAPOLIS, Dec. 23rd, 1913.

"In the matter of the \$100,000 of six per cent twenty-five year bonds recently authorized by the Company will say that I have made a number of inquiries from responsible bond houses as to

"the price which should be obtained for a bond of this character."

"Taking into consideration the fact that this bond issue would be secured by a second mortgage, and that the property mortgaged is a short road serving only one section of the city, I believe that a net price of par for the issue will be fair to the company."

(Signed) F. A. CHAMBERLAIN, *President*.

On motion of Mr. Clark, duly seconded, the President's report was unanimously accepted and ordered incorporated in the Minutes of this meeting.

The following resolution offered by Mr. Norris, seconded by Mr. Foster, was unanimously adopted;

Resolved, that pursuant to the foregoing report and recommendation of the President, the proposed \$100,000 issue of the bonds of this Company be sold at par.

The following resolution offered by Mr. Norris, seconded by Mr. Foster was unanimously adopted.

Resolved, that the proper officers voucher and pay out of the funds in the treasury, whatever shall be the excess of price of the property about to be acquired, over and above \$100,000.

Under the vote of the Board at the last meeting, authorizing and requesting the Managing Committee to submit an estimate of the amount necessary to be expended to put the newly acquired property in condition, the Committee reported as follows;

Minneapolis Eastern.

Preliminary Estimate of Cost of Proposed Storage Yard and Necessary Changes Required Therewith.

1,750 sq. ft. extension of steel bridge @ \$2.00.....	\$3,500
Regrading and repaving approach, 200 sq. yards @ \$2.00	400
1,400 cu. yds. concrete, including bridge abutment and retaining wall @ \$10.....	14,000
12,000 cu. yds. earthwork @ 30¢.....	3,600

346 Preliminary Estimate (Continued).

5,200 lin. ft. 75# track @ \$1.25.....	6,500
10 turnouts complete @ \$140.00.....	1,400
New coal shed 20' x 40'.....	1,200
New engine house 24' x 140'.....	3,300
Moving office	100

Gross cost of change..... \$34,000

Salvage.

1½ million brick in building on ground, valued at \$2.00 per M. above wrecking cost.....	3,000
Net cost of change.....	\$31,000

NOTE.—This estimate is preliminary only and subject to revision when thorough survey is made.

Quantities of concrete and earthwork are very close and any changed in estimate would not be very radical.

(Signed)

A. W. TRENHOLM.

J. H. FOSTER.

On motion of Mr. Clark, duly seconded, the report of the Managing Committee was unanimously accepted and ordered incorporated in the Minutes of this meeting.

On motion of Mr. Clark, duly seconded, the Managing Committee were authorized to proceed, at the proper time, with the improvement, practically in line with their report.

Thereupon meeting of Directors was adjourned without day.

J. H. FOSTER, *Secretary*.

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PL'T'F EX. "O."

Copy of Resolution Adopted at Meeting of Directors of C., St. P., M. & O. Ry. Co. Held December 9th, 1913.

(Rec. 4, Page 153.)

The following resolution was offered, duly seconded, and adopted:

Resolved: That to enable the Minneapolis Eastern Railway Company, (one-half of the capital stock of which is owned by this Company) to acquire the $\frac{1}{2}$ of land approximately 350 x 150 feet, located at the corner of First Street and Fifth Avenue, Minneapolis, Minnesota, required by additional facilities, the President be and is hereby authorized to advance to that Company the sum of not exceeding \$50,000, and to accept therefor the bonds of the Minneapolis Eastern Railway Company presently to be issued.

348 Supreme Court of the United States, October Term, 1916.

No. —.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO,
St. Paul, Minneapolis and Omaha Railway Company, and Min-
neapolis Eastern Railway Company, Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, Defendant in Error.

Stipulation for Printing of Record.

To James D. Maher, Clerk United States Supreme Court, Wash-
ington, D. C.:

You are hereby notified that the Plaintiffs in Error in the above
entitled cause intend to rely on each and all of the Assignments of
Error contained in the record transmitted to you by the Clerk of the
Supreme Court of the State of Minnesota, and the following parts
of the record are necessary for the consideration thereof, to-wit:

(1) Caption, summons, petition, joint answer and appearance of
defendants, record of District Court of Hennepin County, Minnesota,
including testimony of witnesses J. H. Foster, A. W. Trenholm, E.
T. Abbott, Peter Houle, Frank H. Burdick, F. A. Chamberlain, E.
R. Barber, D. F. Jurgensen and P. C. Sanborn, found on pages 77-
231, inclusive, of the printed record of the testimony transmitted to
you by the Clerk of the Supreme Court of the State of Minnesota,
certificate of trial court respecting federal questions presented and
considered, proposal of settled case, stipulation resettled case, order
of trial judge settling case, opinion of trial judge on decision of case,
including his findings of fact and conclusions of law, memorandum
opinion of trial judge, judgment of the trial court, notice of
349 appeal to the Supreme Court of the State of Minnesota and
acknowledgment of service thereof by respondent, all of
which are contained in said printed record.

(2) Stipulation that transcript containing the foregoing proceed-
ings is correct and shall constitute the record in said case.

(3) Assignments of Error.

(4) Petition for Writ of Error.

(5) Bond on Writ of Error.

(6) Writ of Error.

(7) Order allowing Writ of Error.

(8) Certificate of Lodgment.

(9) Citation and Service.

(10) Return to Writ of Error.

(11) All minutes, orders and judgment of the court made in the
case.

(12) All certificates made by the Clerk of the Supreme Court of
Minnesota with reference to the proceedings, rulings and judgment
of the court.

(13) All endorsements of filings and acknowledgment and proof

of service of pleadings and other documents filed therein and mentioned above.

(14) Opinion of Supreme Court of the State of Minnesota, filed July 21, 1916.

(15) Certificate of the Clerk of the Supreme Court of the State of Minnesota to the correctness of the records enumerated above.

(16) Exhibit A. Findings and order of the Railroad and Warehouse Commission of Minnesota in the above entitled matter.

Exhibit B. Articles of Incorporation of the Minneapolis Eastern Railway Company.

Exhibit C. Minutes of Board of Directors' meeting held October 25, 1878.

Exhibit D. Contract between the Minneapolis Eastern Railway Company, Chicago, Milwaukee & St. Paul Railway Company and Chicago, St. Paul, Minneapolis and Omaha Railway Company, and supplemental contract.

Exhibit E. Minutes of stockholders' meeting of the Minneapolis Eastern Railway Company.

Exhibit F. Minutes of meetings of the stockholders and Board of Directors on June 20, 1882.

350 Exhibit G. Minutes of Directors' meeting of the Chicago, Milwaukee & St. Paul Railway Company of August 9, 1880.

Exhibit H. By-laws of the Minneapolis Eastern Railway Company.

Exhibit I. Minutes of meetings of the Minneapolis Eastern Railway Company adopting amendments to its By-laws.

Exhibit J. Extracts from minutes of Directors' meetings of the Minneapolis Eastern Railway Company, June 13, 1906.

Exhibit K. Resolution of the Directors of the Chicago, St. Paul, Minneapolis and Omaha Railway Company of October 16, 1908.

Exhibit No. 6. Statement of results of operation of Minneapolis Eastern Railway Company omitting last two lines.

Exhibit No. 6a. Statement of shipments from Minneapolis Eastern Railway Company to other railroads.

Exhibit No. 7. Extracts from minutes of Directors' meeting of the Minneapolis Eastern Railway Company, June 28, 1905.

Exhibit N. Extracts of minutes of meetings at which mortgage bonds were authorized.

Exhibit O. Resolution of C. St. P. M. & O. Ry. Co. of December 9, 1913.

O. W. DYNIS &
FRED W. ROOT,
W. H. NORRIS &
JAMES B. SHEEAN,
Attorneys for Plaintiffs in Error.

It is hereby stipulated by and between the above entitled parties that the records enumerated above shall constitute the transcript of record on Writ of Error to the Supreme Court of the United States in said cause, and the Clerk of said Supreme Court is hereby requested to print such parts of said record as are above designated.

Proof of service of the above notice is hereby acknowledged by the Defendant in Error.

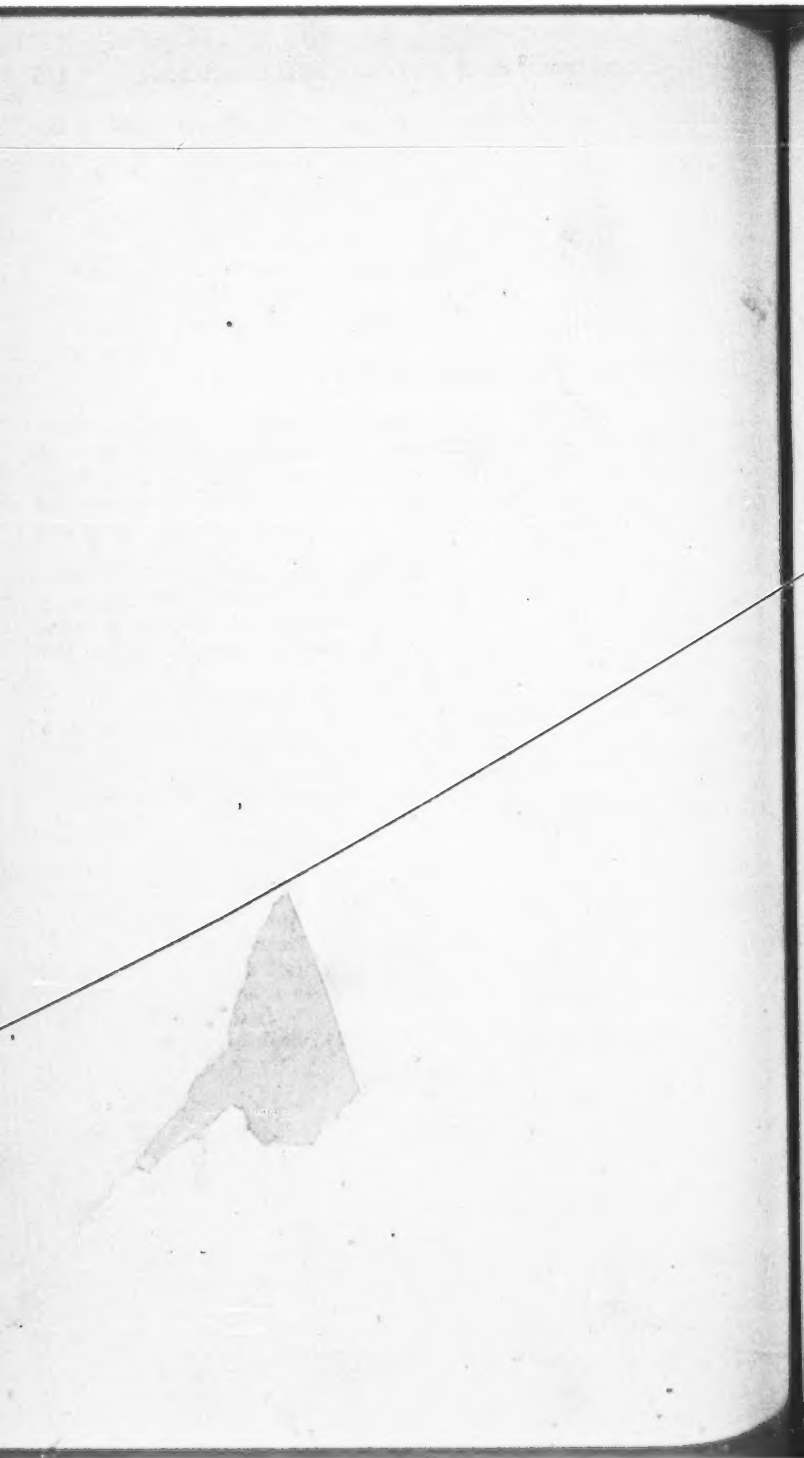
O. W. DYNES,
FRED W. ROOT,
W. H. NORRIS,
JAMES B. SHEEAN,
Attorneys for Plaintiffs in Error.
FRANK J. MORLEY,
Attorneys for Defendant in Error.

Dated, St. Paul, Minnesota, October 27, 1916.

351 [Endorsed:] 712—25542. United States Supreme Court, October Term, 1916. No. —. Chicago, Milwaukee & St. Paul Ry. Co., Chicago, St. Paul, Minneapolis & Omaha Ry. Co., and Minneapolis Eastern Ry. Co., Plaintiffs in Error, vs. Minneapolis Civic & Commerce Association, Defendant in Error. Stipulation for printing of record.

352 [Endorsed:] File No. 25,542. Supreme Court U. S., October Term, 1916. Term No. 712. Chicago, Milwaukee & St. Paul Railway Co., Plff in Error, vs. Minneapolis Civic & Commerce Association. Stipulation as to printing record. Filed December 5, 1916.

Endorsed on cover: File No. 25,542. Minnesota Supreme Court. Term No. 712. Chicago, Milwaukee and St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Minneapolis Eastern Railway Company, plaintiff in error, vs. Minneapolis Civic and Commerce Association. Filed October 6th, 1916. File No. 25,542.



FILED

MAR 6 1917

JAMES D. MAHER

CLERK

Supreme Court of the United States.

OCTOBER TERM, 1916.

No.  283

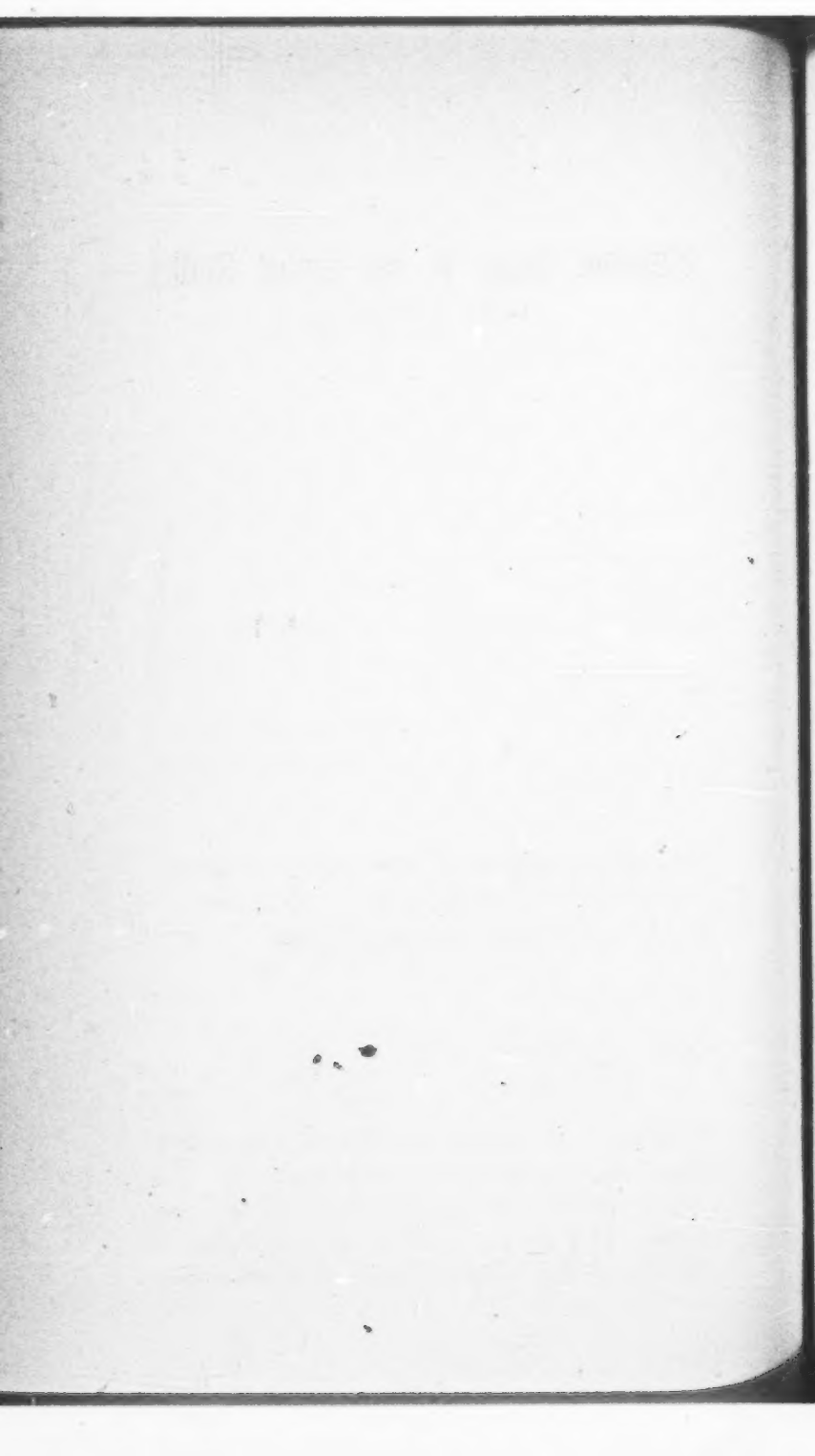
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, AND MINNEAPOLIS EASTERN RAILWAY COMPANY, *Plaintiffs in Error,*

VS.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, *Defendant in Error.*

**Counter-Affidavit of Defendant in Error
for Use in Opposition to Motion
for Rule to Show Cause.**

LYNDON A. SMITH,
FRANK J. MORLEY.
Minneapolis, Minnesota.



Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 712.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, AND MINNEAPOLIS EASTERN RAILWAY COMPANY, *Plaintiffs in Error,*

VS.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,
Defendant in Error.

**Counter-Affidavit of Defendant in Error
for Use in Opposition to Motion
for Rule to Show Cause.**

STATE OF MINNESOTA, }
County of Hennepin. } ss.

LYNDON A. SMITH and FRANK J. MORLEY,
being first duly sworn, on oath say:

That affiant Lyndon A. Smith is the Attorney General of Minnesota; and that affiants are the attorneys for the defendant in error in this cause.

That heretofore, to-wit: on December 19, 1916, plaintiffs in error applied to the Supreme Court of Minnesota for a writ of prohibition to restrain the District Court of Hennepin County from putting into effect its order of December 7, 1916, which order is set forth in full on pages 13 to 16 inclusive of the motion papers of plaintiff in error herein; that in making said application and as a basis therefor plaintiffs in error filed in the Supreme Court of the State of Minnesota an affidavit, of which a true copy is as follows (omitting the title):

AFFIDAVIT FOR WRIT OF PROHIBITION.

STATE OF MINNESOTA, }
County of Ramsey. } ss.

GEORGE W. PETERSON, being first duly sworn, deposes and says:

(1) That he is one of the attorneys for the Chicago, St. Paul, Minneapolis and Omaha Railway Company, one of the railway companies in the above entitled cause; that he makes this affidavit in behalf of the said Railway Company, and likewise in behalf of the Chicago, Milwaukee & St. Paul Railway Company and the Minneapolis Eastern Railway Company, the other railway companies in the said cause.

(2) That the said cause was decided by the Supreme Court of Minnesota on the appeal of the said railway companies on July 21, 1916, judgment was duly entered in the above entitled court on said decision and no remittitur or mandate in said cause has ever come down from the Supreme Court of

Minnesota to the District Court of Hennepin county, Minnesota.

(3) That on August 23, 1916, the said railway companies duly petitioned for a writ of error, an order allowing the writ of error was duly made, a writ of error was duly issued, the Minneapolis Civic and Commerce Association was duly cited to be and appear before the United States Supreme Court, a supersedeas bond was duly given and approved and a return was duly made to the United States Supreme Court, and by virtue of the premises the said cause is now pending in the Supreme Court of the United States and the judgment of the District Court of Hennepin county, Minnesota, and of the Supreme Court of Minnesota has been duly stayed and superseded, and the whole thereof, pending the decision and judgment of the Supreme Court of the United States.

(4) That notwithstanding the premises the Minneapolis Civic and Commerce Association brought on a motion in the District Court of Hennepin county, Minnesota, before the Honorable W. C. Leary, one of the Judges thereof, to set aside the order of said court made under and pursuant to Section 4200 G. S. 1913, which said order made by the court under said Section 4200 stayed the operation of the judgment of the said District Court of Hennepin county, Minnesota.

(5) That the said railway companies appearing specially for such purpose claimed that the District Court of Hennepin county, Minnesota, had no jurisdiction to set aside its order theretofore made under said Section 4200, but notwithstanding the

special appearance and the contentions of the railway companies, the said court made an order setting aside its order theretofore made under said Section 4200, staying the judgment of said court.

(6) That a copy of the order of the District Court of Hennepin county, Minnesota, made under said Section 4200, staying the said judgment, is hereto attached, hereby referred to and made a part hereof and marked Exhibit "A."

(7) That a copy of the said motion papers is likewise hereto attached, hereby referred to and made a part hereof and marked Exhibit "B."

(8) That a copy of the order of the District Court of Hennepin county, Minnesota, made on the said motion, made and filed by the said Court, the Honorable W. C. Leary, one of the Judges of said Court presiding, of date December 7, 1916, is hereto attached, hereby referred to and made a part hereof and marked Exhibit "C."

(9) That by virtue of the premises this affiant alleges the fact to be that the District Court of Hennepin county, Minnesota, was without jurisdiction to make the said order dated and filed December 7, 1916.

(10) That the said District Court of Hennepin county, Minnesota, while entertaining the said motion of the Minneapolis Civic and Commerce Association, notwithstanding the objection of the said Railway Companies to the jurisdiction of the court so to do, nevertheless in the making and filing of said order of date December 7, 1916, stayed and suspended the said order, thereby rendering the

same ineffective during the period of the stay, in order that the said Railway Companies, if aggrieved, might sue out their proper writ of prohibition commanding the said District Court of Hennepin county to cease entertaining jurisdiction and thereby prohibiting the said order from becoming effective.

(11) That unless the said court is restrained and the order of said court is prohibited from becoming effective, the Railroad and Warehouse Commission of Minnesota will promulgate rates pursuant to the judgment of this court and the judgment of the District Court of Hennepin county, to the manifest prejudice of the said Railway Companies.

(12) That the respondents and the Attorney General have consented that the question of the jurisdiction of the Court to make the said order of December 7, 1916, be determined by writ of prohibition.

(13) That the said Railway Companies are without remedy, save by the interposition of this Court, and pray that a writ of prohibition issue restraining the said court and the order of said court in the premises.

GEO. W. PETERSON.

Subscribed and sworn to before me this 19 day of December, 1916.

P. A. ROCKWELL,

(Seal)

Notary Public,

Ramsey County, Minnesota.

My commission expires June 20, 1923.

That an order to show cause was forthwith issued by the Supreme Court of Minnesota, directed to the District Court of Hennepin County and to the Honorable W. C. Leary, a Judge thereof and to the defendant in error herein, as follows (omitting the title):

State of Minnesota, to the District Court of Hennepin County, Minnesota, Honorable W. C. Leary, a Judge thereof, and Minneapolis Civic & Commerce Association:

Whereas, it has been made to appear that the Railway Companies above entitled have perfected an appeal to the Supreme Court of the United States in the cause entitled, Minneapolis Civic & Commerce Association vs. Minneapolis Eastern Railway Company, Chicago, St. Paul, Minneapolis and Omaha Railway Company, and Chicago, Milwaukee and St. Paul Railway Company, decided by this Court on July 21, 1916, and reported in 158 N. W., page 817, and have complied with the statutes of the United States and the rule of the Supreme Court of the United States in order to a supersedeas, and,

Whereas, the District Court of Hennepin county, Minnesota, the Honorable W. C. Leary presiding, on motion of the Minneapolis Civic & Commerce Association, is assuming to entertain jurisdiction in the said cause, reference being had to the affidavit of George W. Peterson, one of the attorneys for the Chicago, St. Paul, Minneapolis and Omaha Railway Company, hereto attached, hereby referred to and hereby made a part hereof;

Therefore, you are hereby commanded to desist and refrain from any further proceedings in the said cause and to show cause before this Court on January 2, 1917, at the opening of court on said day, or as soon thereafter as counsel can be heard, why you should not be absolutely restrained from further proceeding in said cause; and the order of December 7, 1916, prohibited from becoming effective.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of Minnesota.

I. A. CASWELL,

Clerk Supreme Court of Minnesota.

By V. C. PIDGEON,

(Seal)

Deputy Clerk.

Allowed.

CALVIN L. BROWN,

Chief Justice Supreme Court of Minnesota.

Dated St. Paul, Minnesota, December 19, 1916.

That said matter came duly to be heard before the Supreme Court of Minnesota, and after hearing counsel for the respective parties, said Court, on the 2nd day of February, 1917, made and entered an order quashing the writ of prohibition theretofore issued by it directed to the District Court of Hennepin County; that in making said order the Supreme Court of Minnesota filed a *per curiam* opinion, of which a true copy is set forth on pages 17 and 18 of the motion papers of plaintiffs in error herein.

That thereafter and on the 14th day of February, 1917, final judgment was duly entered in the

Supreme Court of Minnesota adjudging that said writ of prohibition theretofore issued by it be and the same thereby was in all things quashed.

Affiants further state that they have read the affidavit of George W. Peterson herein set forth on pages 5 to 12 inclusive of the motion papers of the plaintiffs in error, and particularly the allegation at the end of paragraph 12 of said affidavit, to-wit:

"That the purpose of said motion (in the District Court of Hennepin County) was to obtain an order in aid of execution of the judgment and in order to promulgate rates pursuant to the said judgment."

Affiants deny said allegation above quoted and allege that the sole purpose of the said motion was to procure an order vacating the stays of the order made by the Railroad and Warehouse Commission herein and of the judgment of the District Court of Hennepin County, Minnesota, affirming said order of the Railroad and Warehouse Commission.

Affiants further state that they have read the allegations of paragraphs 16, 17 and 18 of said affidavit, and they deny that it is the intention, either of the defendant in error or of the Attorney General of Minnesota, to apply to the Railroad and Warehouse Commission of Minnesota to promulgate rates pursuant to the judgment of the District Court of Hennepin County herein and the judgment of the Supreme Court of Minnesota. Affiants further state that under the statutes of the State of Minnesota the Railroad and Warehouse Commission would have no authority to promulgate

rates conforming to its order even if the order of December 7th, 1916, made by the District Court is valid.

LYNDON A. SMITH,
FRANK J. MORLEY.

Subscribed and sworn to by Lyndon A. Smith
before me this 2nd day of March, 1917.

G. K. SPANGENBERG,
Notary Public,

Ramsey County, Minnesota.

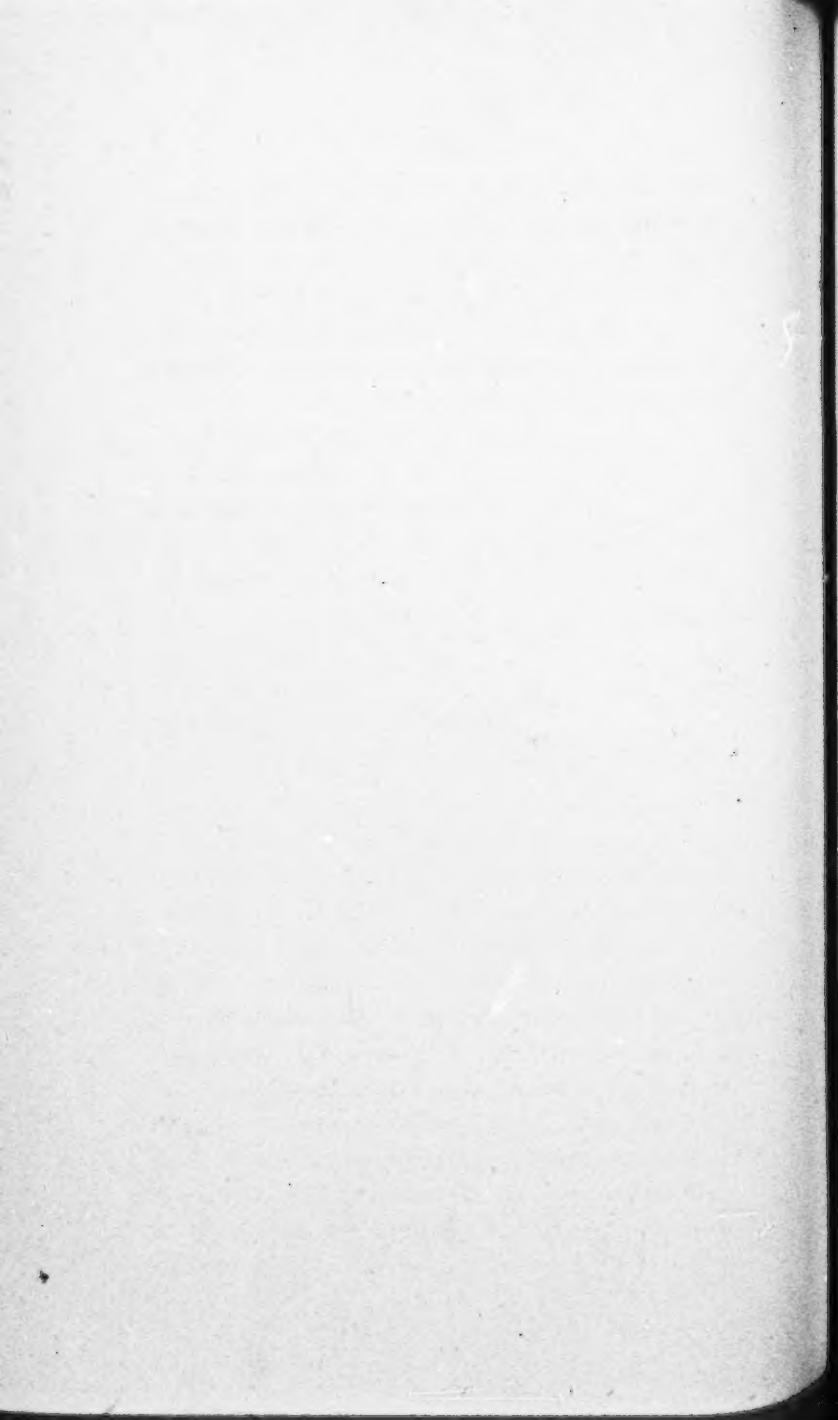
My commission expires March 11, 1922.

Subscribed and sworn to by Frank J. Morley be-
fore me this 2nd day of March, 1917.

VIOLA A. HIRSCH,
Notary Public,

Hennepin County, Minnesota.

My commission expires January 4, 1924.



MAR 6 1917

JAMES D. MAHER
CLERK**Supreme Court of the United States.**

OCTOBER TERM, 1916.

No. 712.

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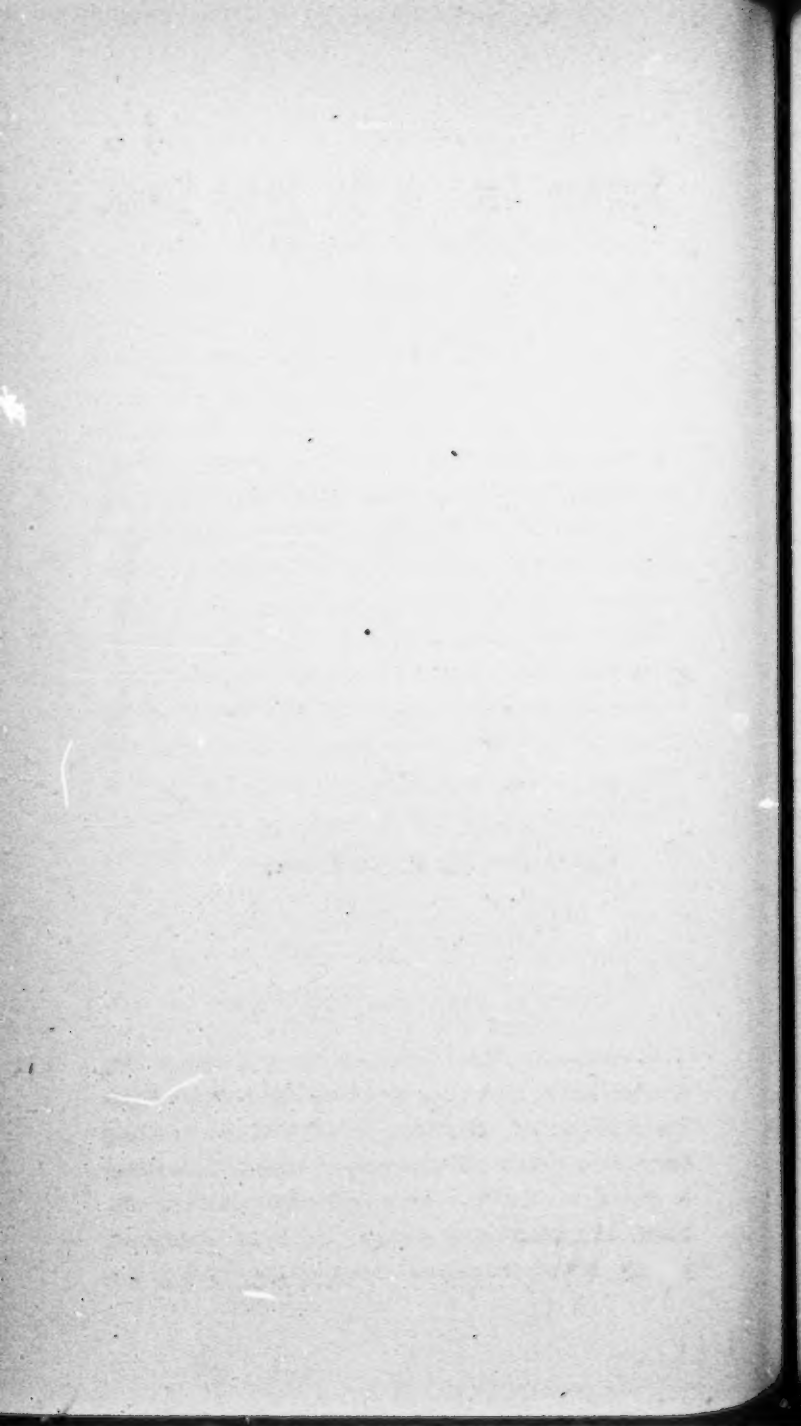
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-
PANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMA-
HA RAILWAY COMPANY, AND MINNEAPOLIS EAST-
ERN RAILWAY COMPANY, *Plaintiffs in Error,*

VS.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,
Defendant in Error.

**Brief for Defendant in Error in
Opposition to Motion for
Rule to Show Cause.**

LYNDON A. SMITH,
Attorney General of Minnesota,
FRANK J. MORLEY,
Attorneys for Defendant in Error.



Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 712.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, AND MINNEAPOLIS EASTERN RAILWAY COMPANY, *Plaintiffs in Error,*

VS.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,
Defendant in Error.

Brief for Defendant in Error in Opposition to Motion for Rule to Show Cause.

STATEMENT OF THE CASE.

In October of 1912, the defendant in error filed a complaint with the Railroad and Warehouse Commission of the State of Minnesota, setting forth that plaintiffs in error, Chicago, Milwaukee & St. Paul Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company, jointly owned the capital stock of the other plain-

tiff in error, the Minneapolis Eastern Railway Company, and that, in fact, the latter company was a part of the terminals of the two other companies, and that certain switching charges imposed by the Minneapolis Eastern Company for switching to industries on its rails cars of grain coming into Minneapolis over the lines of the two other companies in addition to their line rates were unlawful. The matter came duly on to be heard before the Commission on December 21, 1912. On January 28, 1915, the Commission made an order finding that the charges complained of were in fact unlawful and requiring the railroad companies to cease and desist from exacting them. The railroad companies appealed to the District Court of Hennepin County, as authorized by the statutes of Minnesota. By the express terms of Section 4192 of the General Statutes of Minnesota for 1913 such an appeal when taken to the District Court does not of itself stay or supersede the order appealed from, but the matter of whether the order shall in fact be stayed is committed to the discretion of the District Court. Pursuant to this statute the railroad companies applied to the court for an order staying the order of the Railroad Commission, and under date of February 8, 1915, the District Court made an order staying the operation of the order of the Railroad Commission "until the final determination of this appeal or *until the further order of the Court.*"

(Motion papers of plaintiffs in error, page 6).

Thereafter the cause came on to be heard in the

District Court and on January 3, 1916, that Court made an order finding that the order so made by the Railroad and Warehouse Commission was lawful and reasonable, and ordering that judgment be entered affirming it.

By the express terms of Section 4200 of the General Statutes of Minnesota an appeal taken from the District Court to the Supreme Court does not stay the operation of the order or judgment "unless the District or Supreme Court shall so direct and unless the carrier appealing * * * shall give bond," etc. The railroad companies having announced that they intended to appeal to the State Supreme Court, the District Court in its order affirming the order of the Commission made a further order providing that the "order staying the order of the Railroad and Warehouse Commission herein, dated Feb. 8, 1915, be continued in full force and effect *until further order made herein*" (Record, f. 249). In the memorandum attached to its order, which by its terms was made a part thereof, the District Court stated that the defendant in error might later apply for a vacation of the stay, if so advised (Record, f. 256).

The railroad companies thereupon perfected their appeal to the Supreme Court of Minnesota and the return to that Court was duly made by the Clerk of the District Court. At that time no bond had been given by the railroad companies to make the stay effective, as provided by the provisions of Section 4200 above referred to. Thereupon and after the appeal had been in all respects perfected

and after the return to the Supreme Court of Minnesota had been made, the plaintiffs in error made a further application to the District Court of Hennepin County for a stay, and on April 6, 1916, the Court again made a stay order, which by its terms was to continue in effect "until the final determination of said appeal or *further order of this Court*," which order provided expressly for a bond to be given by the railroad companies. The bond was forthwith tendered and approved by the District Court.

(Motion papers of plaintiffs in error, pages 8, 9).

Thereafter the judgment of the District Court was affirmed by the Supreme Court of Minnesota, but, as counsel state, no mandate has ever come down from the Supreme Court of Minnesota to the District Court, owing to the fact that the plaintiffs in error have applied for and obtained the writ of error to the Supreme Court of the United States and a bond intended to operate as a supersedeas has been duly filed.

Notwithstanding these facts, the defendant in error made a motion before the District Court of Hennepin County to vacate the various orders theretofore made by that Court staying the order of the Railroad and Warehouse Commission, which by their express terms were to continue in effect until further order of the District Court. The plaintiffs in error at the hearing of the motion appeared, in terms, specially and objected that the District Court had no jurisdiction to hear and determine the motion or to vacate the stays upon the express ground that the writ of error operated as

a supersedeas.

(Motion papers of plaintiffs in error, page 10).

The District Court, after hearing counsel, made an order under date of December 7, 1916, reciting that the plaintiffs in error had appeared specially and objected to the jurisdiction of the Court to hear and determine the motion but ordering nevertheless that the motion be granted. The plaintiffs in error had previously indicated an intention to apply to this Court for a writ of prohibition in case the District Court determined that it had jurisdiction to vacate the stays, and at their request and to enable the plaintiffs in error, if so advised, to apply to this Court for such a writ, the Court granted a stay of the order of December 7, 1916, for a period of ten days, which it afterwards at the request of the plaintiffs in error, extended until and including December 20, 1916.

(Motion papers of plaintiffs in error, pages 14, 16).

Instead of applying to this Court for a writ of prohibition, the plaintiffs in error applied to the Supreme Court of Minnesota for such a writ, and an order to show cause was issued by the Supreme Court of Minnesota directed to the District Court of Hennepin County and to the defendant in error, directing them to show cause why they should not be absolutely restrained from further proceeding in this cause and why the order of December 7, 1916, should not be prohibited from becoming effective. The affidavit upon which this order was issued recited the allowance of the writ of er-

ror and the filing of the supersedeas bond, and alleged that by virtue of the premises "*the District Court of Hennepin County, Minnesota, was without jurisdiction to make the said order dated and filed December 7, 1916.*"

(Motion papers of defendant in error, page 4).

The matter was thereupon duly heard in the Supreme Court of Minnesota, and on the 2nd day of February, 1917, an order was made by the Supreme Court of Minnesota quashing the writ. The *per curiam* opinion filed by the Court contains the following statement: "We are unable to see how the writ of error and supersedeas affected the power or jurisdiction of the District Court. The matter of a stay is a matter collateral to the judgment. *The District Court had jurisdiction to vacate it. This disposes of the case. Writ quashed.*"

(Motion papers of plaintiffs in error, pages 17, 18).

Thereafter and on February 14, 1917, pursuant to this order, judgment was duly entered in the Supreme Court of Minnesota quashing the writ of prohibition directed to the District Court of Hennepin County.

(Motion papers of defendant in error, page 7).

I.

Regardless of whether, in fact, the District Court had jurisdiction to vacate the stays, the decision of the Supreme Court of Minnesota, invoked by the plaintiffs in error themselves, determining that

it did have jurisdiction, and quashing the writ of prohibition directed to the District Court, estops them from challenging its want of jurisdiction.

When the District Court made the order of December 7, 1916, at the request of counsel for plaintiffs in error, it suspended its order to enable counsel to apply to this Court for a writ of prohibition to prevent its order from becoming effective. Counsel, instead of applying to this Court, elected to submit the question of whether the District Court of Hennepin County, in vacating the stays, acted without jurisdiction to the State Supreme Court. That Court determined that the District Court had jurisdiction. Having themselves elected to submit the question to the State Supreme Court, we think the plaintiffs in error are bound by the decision of that Court, right or wrong, so long as it stands unreversed.

We admit, of course, that the question is a federal one, and that the state courts have no authority to finally determine a federal question, but they do at times have authority to determine such questions in the first instance. In the present case, the Supreme Court of Minnesota plainly had jurisdiction in the prohibition case to determine whether or not the District Court of Hennepin County had acted without jurisdiction in making the order of December 7th. Its exercise of such authority was invoked by the plaintiffs in error themselves. They applied to that Court for the writ of prohibition instead of applying to this Court. They chose their own forum in which to litigate the question.

It is idle for them, as it seems to us, to now contend that they are not bound by the decision which the Supreme Court of Minnesota rendered so long as that decision stands unreversed. This view of the matter we think is sustained by the authorities.

In *Dowell v. Applegate*, 152 U. S. 327, defendant relied upon a judgment rendered in a case removed from a state court into a circuit court of the United States. The cause had been removed on the ground that it involved the construction of an internal revenue act of Congress. It was claimed by plaintiff that the judgment was void because the ground on which the federal court had assumed jurisdiction was insufficient in law to make the case one arising under the laws of the United States. Mr. Justice Harlan, in disposing of this contention, said:

"But that was a question which the circuit court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it and could not be questioned by them, or either of them, collaterally or otherwise, than on writ of error or appeal to this court. * * * This disposes of the first objection urged against the decree in the federal court. That decree cannot be treated in this suit as void for want of jurisdiction."

In *Kellogg v. Maloney*, 81 C. C. A. 531, 152 Federal 405, defendants in ejectment claimed title under a tax deed which the plaintiff claimed to be

void because the court in the suit to foreclose the tax lien had acted without jurisdiction. It appeared that in the suit to foreclose the tax lien the defendant (plaintiff in the ejectment suit) had moved to quash the summons issued therein for the reason that the proper foundation for the issuance of the summons had not been made, and that the summons itself did not comply with the law. The Court said:

"He thereby invoked the judgment of the state court in respect to whether the foundation of the suit, to-wit: the issuance of the certificate of delinquency was in conformity with the provisions of the state statute and whether the summons also conformed to its requirements. The state court held the affirmative of both propositions in denying the motion to quash. * * * That the plaintiff in error cannot again litigate the same question in another court is clear."

In support of its decision the Circuit Court of Appeals cited, in addition to *Dowell v. Applegate*, *supra*, a decision of the Supreme Court of California in *White v. Fresno National Bank*, 98 Cal. 166, 32 Pac. 979. Inasmuch as the facts in that case are very similar to the facts in this case, we desire to call this decision particularly to the attention of the Court. Judgment had there been rendered against the defendant bank and it had appealed to the Supreme Court of California. In the language of that Court:

"The principal point upon which appellant relies for a reversal of the judgment is that by virtue of Section 16, Article 12 of the Constitution, defendant being a corporation, could not be sued in San Joaquin County. There-

fore no jurisdiction was ever obtained over it. When this action was originally brought the bank objected to the jurisdiction of the Superior Court of San Joaquin County to proceed in the matter and applied to this court for a writ of prohibition based upon said alleged want of jurisdiction, asking for an order directing that court to refrain from further proceedings in the case. The application for the writ was heard in banc and denied, and a petition for a rehearing was also denied. While such decision may not, technically speaking, be the law of the case, yet it is *res adjudicata* as to that subject."

In *Kelly v. Sakai*, 72 Wash. 364, 130 Pac. 503, judgment had been rendered by default in favor of Sakai against Kelly. About ten months thereafter Kelly made a motion to set aside the judgment upon the ground that in fact no process had ever been served upon him and therefore the Court had no jurisdiction. This motion was denied because not accompanied by an affidavit of merits. Thereafter Kelly made another motion for the same relief accompanied by an affidavit of merits. This second motion was denied, "for the reason that the matters therein have been heretofore adjudicated against defendant." An appeal was duly prosecuted from the order denying the second motion, which was thereafter dismissed because of the insufficiency of the record to enable the court to review the correctness of the order. Kelly then brought an action against Sakai under the statute to set aside the default judgment upon the ground that it had been rendered without service of process upon him.

The Court said:

"If we were concerned with questions of error of the Superior Court in denying appellant's first and second motions to vacate the judgment, it is not impossible that both could have been shown to have been erroneous. But we have no such question here because this is not an appeal or proceeding to review either of these orders. Of course, there was no want of jurisdiction in making them. Nor are we here concerned with the question of the finality of the first order as an original question. It will be noticed that the second motion was denied, for the reason that the question raised thereby had theretofore been formally adjudicated against the appellant * * * We are of the opinion that the order denying the second motion became a final adjudication as to the validity of the judgment against appellant."

In *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119, the holder of a certificate of delinquency for unpaid taxes instituted proceedings to foreclose the certificate, and such proceedings were had that a default judgment of foreclosure was entered. The opinion of the Court states that, as a matter of fact, no personal service was had on the defendants in the suit, that there was no appearance by them, and that the published summons or notice was void. Thereafter the defendants made a motion to vacate the judgment on the ground, among others, that the court had no jurisdiction, either of the subject matter of the action or of the person of the defendants. This motion was denied, and a further motion to reconsider was also denied. An appeal was taken which was dismissed because not

taken within the time limited by law. Later the defendants instituted this action to vacate the same judgment and quiet title to the premises.

The Court said :

"We deem it unnecessary to inquire whether the motion to vacate the tax judgment constituted a general or a special appearance in that proceeding because the moving parties invoked the jurisdiction of the court to vacate the judgment, and the order denying the same is necessarily binding upon them. It is folly to claim that a party is not bound by an order denying relief which he himself prays for. The moving parties were before the court demanding relief. The court had full and complete jurisdiction of the subject matter and the parties, and its decision is final until reversed or set aside in some proper proceeding authorized by law. Nor does the fact that the original judgment was void change the rule.

* * * It is the order denying the motion to vacate that works the estoppel and not the original judgment. The court does not hold the original judgment valid, but holds the parties estopped to challenge its validity."

So in the instant case, the plaintiffs in error were before the Supreme Court of Minnesota demanding that that Court issue a writ of prohibition directed to the District Court of Hennepin County upon the ground that the latter Court was acting without jurisdiction in making the order of December 7th. The Supreme Court of Minnesota in the prohibition case had full and complete jurisdiction of the subject matter and the parties, and its decision determining that the District Court of Hennepin County had jurisdiction is final until reversed or set aside, and the fact, if it be a fact, that

the District Court of Hennepin County did not have jurisdiction does not change the rule. It is the judgment of the Supreme Court of Minnesota determining that the District Court had jurisdiction that works the estoppel. It is not necessary to hold that the District Court of Hennepin County did have jurisdiction, for as it seems to us the plaintiffs in error are estopped to challenge its want of jurisdiction.

II.

The allowance of the writ of error and the approval of the bond did not deprive the District Court of power to vacate the stay orders which it had theretofore made, and which by their express terms were to continue in force only until further order made by the court.

By the express language of Section 4192, of the General Statutes of Minnesota for 1913, an appeal to the District Court from an order of the Railroad and Warehouse Commission does not of itself stay or supersede the order appealed from, but the matter of whether the order shall in fact be stayed is committed to the discretion of the District Court. Likewise, by the express language of Section 4200, an appeal to the State Supreme Court from the judgment of the District Court affirming an order made by the Commission does not of itself stay the order or judgment. In that case also the state legislature left to the discretion of the District Court (where application is made to that Court) whether a stay should in fact be granted. And in

the present case, in granting the stays, the District Court in each instance granted only a temporary stay "until the further order of the court."

Our position is, assuming that the writ of error operated as a supersedeas, that it only superseded the judgment of the Supreme Court of Minnesota, which affirmed the judgment of the District Court; that thereby it prevented the issuing of any remittitur from the Supreme Court of Minnesota to the District Court; and that by reason of the premises it left the case in exactly the same position as though the judgment of the District Court had never been affirmed by the Supreme Court of Minnesota, but that further than this it had no effect.

But as we have pointed out, it is not essential, in order for the judgment of the District Court under the state statute to become effective, that it be affirmed by the Supreme Court of Minnesota. By the express language of the statute the judgment of the District Court is in full force and effect notwithstanding an appeal, *unless the court stays it*. Likewise, it is not essential, in order for the order of the Commission to become effective, that it be affirmed by the District Court. In that case, also, by the express language of the statute, the order is in full force and effect notwithstanding the appeal, *unless the court stays it*. Under the statutes referred to, neither the taking effect of the Commission's order nor of the judgment of the District Court affirming it depend in the slightest degree upon the return of the mandate from the State Supreme Court.

We have carefully examined the decision of the United States Supreme Court in *Louisville & Nashville Railway Company v. Behlmer*, 169 U. S. 644, relied upon by counsel before the State Supreme Court. In our judgment it sustains the authority exercised by the District Court in every respect and directly contradicts the position for which the counsel are contending. In the case cited, one Behlmer had filed a petition before the Interstate Commerce Commission, which resulted in an order requiring the railway companies to abstain from making certain discriminatory freight charges. The companies having failed to comply with the order, Behlmer filed his petition in a Circuit Court of the United States, praying proper process restraining the companies from violating the order. The Circuit Court entered a decree dismissing the bill. Behlmer appealed to the Circuit Court of Appeals, and the latter Court reversed the decree of the Circuit Court and directed that the order of the Interstate Commerce Commission be enforced. An appeal was then allowed and perfected to this Court from the judgment of the Circuit Court of Appeals.

The Court, in discussing the applicable federal statute, said:

"When then the Interstate Commerce Commission was created and provision made for the enforcement of its orders by the Circuit Courts, while appeals were allowed from the decrees of those courts to this court, it was the legislative will that such appeals should not suspend the operation of the decrees appealed from."

The court then referred to the fact that by subsequent legislation the appeal from the decision of the Circuit Court had to be prosecuted to the Circuit Court of Appeals, and continued:

"But such appeal would not operate to supersede the decree of the trial court, nor would such decree be superseded if the case were brought to this court from the Circuit Court of Appeals, even though the judgment of the latter court were superseded."

This is exactly the contention which we are making in this case. It is our claim that the taking of the appeal from the judgment of the District Court of Hennepin county to the Supreme Court of Minnesota, did not deprive the District Court of power to grant, or having granted, of power to continue, modify, or vacate the stays it made of the Commission's order. And likewise, it is our contention that the allowance of the writ of error from the Supreme Court of Minnesota to the Supreme Court of the United States, does not deprive the District Court of Hennepin County of like jurisdiction, *even though by the allowance of the writ of error and the approval of the supersedeas bond the judgment of the Supreme Court of Minnesota, affirming the judgment of the District Court of Hennepin County, has been in all respects superseded.* And this is exactly the holding of the Supreme Court of the United States in *Louisville & Nashville Railway Company v. Behlmer*, as we read its decision.

Furthermore to our minds the action of the District Court in granting a stay of an order made

by the Railroad and Warehouse Commission is analogous to the power it exercises in granting a temporary injunction. The very method provided by the state statute for reviewing an order made by the Commission is equivalent, in fact, if not in form, to a suit to set aside or enjoin such an order. Under the amended statute relating to orders made by the Interstate Commerce Commission, the method of review is by an action brought in a federal court to set aside the order and enjoin its enforcement. Under the state statute, the proceeding is in the form of an appeal, with a provision for a stay in the discretion of the court pending the appeal. It is a proceeding of an equitable nature, and for this reason the effect of the allowance of the writ of error in this case depends, as we view it (and we quote from the decision of this court in *Hovey v. MacDonald*, 109 U. S. 150), "upon the effect which, according to the principles and usages of a court of equity, an appeal has upon proceedings and decrees of the court appealed from, and the doctrines which apply to a *supersedeas* can only be brought in by way of analogy."

In the case cited, attorneys had filed a bill against their client, setting up a lien upon a certain fund which by order of the lower court pending a hearing was put in custody of a receiver. Later a decree was entered by the court sustaining a demurrer to the bill and dismissing the bill with costs. An appeal was immediately taken, and the proper steps taken to make it operative as a *supersedeas*, if such an appeal, under the circumstances, could have that effect. Notwithstanding the appeal, the

lower court directed the receiver to pay the entire fund over to the client, which he accordingly did. Thereafter, its decree was reversed by the appellate court. Justice Bradley said:

*"It is clear that the force of the decree was not affected by the appeal, although it was in the power of the special term to have continued the injunction and to have retained the fund in its control in the hands of the receiver had it seen fit to do so. * * * But if the court failed to do what it might properly have done, such failure ought not to be visited upon the receiver, who was the mere instrument and hand of the court, and subject to its order. It was his duty to obey the decree as made."*

Just as the appeal in that case did not deprive the lower court of jurisdiction in the premises, so in this case likewise the allowance of the writ of error did not deprive Judge Leary of jurisdiction to vacate the various stay orders which he had granted, and which by their terms were only to continue in effect until further order made by him.

Conceding, however, for the purpose of the argument that the writ of error in this case operated as a supersedeas, and not only superseded the judgment of the Supreme Court of Minnesota, but also the judgment of the District Court, we still contend that it did not in any respect deprive Judge Leary of authority to vacate the temporary stays. The question whether or not the stay orders should be further continued in effect was plainly, to our minds, a collateral matter, jurisdiction to determine which still remained in the District Court, notwithstanding the allowance of the writ. Just

as in a criminal case, notwithstanding an appeal, jurisdiction would remain in the lower court to determine whether a prisoner released on bail should be put back into the custody of the sheriff, or in a proceeding to foreclose a mortgage whether a receiver should be appointed, or having been appointed, should be removed, or in an injunction suit, whether a temporary injunction theretofore granted, should be continued in effect or dissolved; so here, as it seems to us, jurisdiction remained in the District Court to determine whether the stay orders theretofore made by it should be continued, modified, or vacated altogether.

In *ex parte Collins*, 151 Fed. 358, it was held that the granting by a state court of a writ of error for a review by the Supreme Court of the United States of its decision in a *habeas corpus* case did not deprive the state court of jurisdiction to set aside an order made at the same time admitting the prisoner to bail. In denying the subsequent application to a federal court for the issuance of a writ of *habeas corpus* to discharge the prisoner, the federal judge said:

"The Superior Court of the City and County of San Francisco, in vacating the order admitting the prisoner to bail *did not trench on the jurisdiction of the Supreme Court to determine any question arising upon the writ of error*. It only set aside an order which it had become satisfied was improvidently made, and this it had undoubted authority to do, certainly, as in this case, before the acceptance of bail thereunder."

So in the present case Judge Leary only vacated the temporary stay orders theretofore granted by

him and which he was satisfied ought no longer to be continued in effect. This we think he had jurisdiction to do notwithstanding the allowance of the writ of error.

Counsel in their motion papers state that, unless restrained, it is our intention to ask the Railroad Commission of Minnesota to forthwith promulgate rates (page 11 of their motion papers). The statutes of Minnesota afford no such remedy. The Railroad Commission would in no event have that power. We therefore have no intention to ask them to exercise it. Doubtless if the order of the District Court vacating the stays is upheld and the order of the Railroad Commission is properly in effect, interested shippers would refuse to pay the switching charges pending the decision of this Court. Or a writ of mandamus might be obtained in the state courts. But the Railroad Commission could not promulgate any rates for the railroad companies, if they should disobey its order.

Having, as we believe, established the jurisdiction of the District Court to make the order in question, or at least that the plaintiffs in error have no standing to challenge its want of jurisdiction, we respectfully ask that the rule to show cause be denied.

LYNDON A. SMITH,
Attorney General of Minnesota,
FRANK J. MORLEY,
Attorneys for Defendant in Error.

FILED

MAR 6 1917

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No.  283

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY
COMPANY, and MINNEAPOLIS EASTERN RAILWAY COM-
PANY,

Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

Defendant in Error.

**BRIEF OF PLAINTIFFS IN ERROR ON MOTION
FOR WRIT OF SUPERSEDEAS.**

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way Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 712.

**CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY
COMPANY, and MINNEAPOLIS EASTERN RAILWAY COM-
PANY,**

Plaintiffs in Error,

VS.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

Defendant in Error.

**BRIEF OF PLAINTIFFS IN ERROR ON MOTION
FOR WRIT OF SUPERSEDEAS.**

STATEMENT OF THE CASE.

The Minneapolis Civic & Commerce Association filed a complaint with the Railroad and Warehouse Commission of Minnesota, alleging that certain switching charges imposed by the Minneapolis Eastern Railway Company on intrastate consignments moving over the lines of the Chicago, Milwaukee & St. Paul and the Chicago, St. Paul,

Minneapolis and Omaha Railway Companies were unlawful. The Commission held the switching charges were unlawful and the order of the Commission was affirmed by the District Court of Hennepin county, Minnesota, on December 31, 1915, and by the Supreme Court of Minnesota on July 21, 1916, the decision being reported in 158 N. W. Rep. 817. (Trans. p. 107.)

Pending the appeal from the decision of the Railroad and Warehouse Commission, the District Court of Hennepin county made the following order:

"The court having heard the arguments of counsel and being now fully advised in the premises, it is hereby ordered that the motion of the appellants herein be granted and that the operation and effect of the order herein appealed from be stayed until the final determination of this appeal or until the further order of the court.

It is further ordered that the appellants shall keep a detailed account, beginning February 1, 1915, showing all charges collected by the appellants, respectively, on intrastate traffic, in excess of the charges that said appellants, or any of them, would or could have collected had said order of said Commission been complied with. Said detailed account shall show the amount of said excess charges, date of payment, the car number, the consignor and consignee, the party paying the same, and the nature of the traffic upon which said charges accrued. The defendants shall, when and as directed by the court, file with the court a report showing fully the amount of said excess charges so collected and the parties from whom collected."

Under and pursuant to this order the switching charges in question have been allocated for repayments to the shippers in the event the court shall finally determine the charges are unlawful.

In the trial court's order for judgment, and likewise in the judgment, provision was made for staying the judgment, which was adverse to the railway companies.

On appeal to the Supreme Court of Minnesota the following statute was complied with:

"4200. Appeals to Supreme Court—Any party to an appeal or other proceeding in district court under the provisions of this chapter may appeal from the final judgment, or from any final order therein, in the same cases and manner as in civil actions. No bond shall be required from the commission, and no such appeal shall stay the operation of such order or judgment unless the district or supreme court shall so direct, and unless the carrier appealing from a judgment or order fixing rates for transportation of persons or property shall give bond in a sum and with sureties approved by a judge of the court ordering the stay, conditioned that the appellant will refund to the person entitled thereto any amount received for such transportation above the amount finally fixed by the court. Any person paying such excessive charges shall have a claim for the excess, whether paid under protest or not, and, unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such carrier, or such carrier and the sureties on such bond. The appeal may be filed in the supreme court before or during any term thereof, and shall be immediately entered on the calendar and heard upon such notice as the court may prescribe."

The court's order under section 4200 was still effective when the Supreme Court of Minnesota filed its decision on July 21, and when judgment was entered thereon and when the appeal was perfected on August 23rd to the Supreme Court of the United States.

There has been no mandate or remittitur to the District Court of Hennepin county.

The order allowing the Writ of Error provides for a supersedeas, (Trans. p. 121) and in the said appeal the rule of the United States Supreme Court and the Federal statutes were complied with in order to a supersedeas. The supersedeas bond was in the sum of \$30,000. The annual revenues involved are about \$5,000. All the shippers are thrice indemnified, by the ability to pay of the carriers, the allocation of the funds, and the obligations of the bond, and this status will continue pending the appeal. The exact amount of such charges from February 1, 1915, to November 30, 1916, is \$9,758.20.

Notwithstanding the premises, the trial court on December 7, on motion of the Minneapolis Civic & Commerce Association set aside the orders staying the judgment, including the order made under section 4200, suspending, however, the order during the period of the stay provided for in the said order, that the railway companies might sue out a writ of prohibition. The Railway Companies did sue out a writ of prohibition in the Supreme Court of Minnesota, but that court disregarded the rights of the Railway Companies under the supersedeas.

Thereupon the Railway Companies filed their motion for relief with this court, claiming that the order of the trial court of December 7th was an exercise of unauthorized jurisdiction and was in violation of the supersedeas. The motion papers furnish a ready reference to the pertinent proceedings.

POINTS AND AUTHORITIES.

The position of the plaintiffs in error is that the jurisdiction of the court below was in all respects suspended and superseded by the proceedings in error.

The position of the respondents is that the railway companies have superseded the judgment only so far as its validity is concerned and the local courts may make effective rates in accordance with the judgment, the doing of which is merely a collateral matter.

If the position of the respondents is correct, then the railway companies have accomplished nothing by complying with the pertinent Federal rule and statutes in order to a supersedeas, and the order of the court allowing the writ of error, in so far as it provided that the railway companies "give bond according to law in the sum of \$30,000.00, which bond shall operate as a supersedeas bond" was for naught.

THE PERTINENT RULE AND FEDERAL STATUTES.

The question presented appears to be of federal cognizance, which brings us to a consideration of the pertinent rule, federal statutes and decisions. The writ of error was sued out and the appeal perfected under and pursuant to sections 1214, 1653, 1658, 1659, 1660, 1662, 1663 and 1666 Compiled Statutes of the United States 1913.

The rule of the United States Supreme Court covering a supersedeas is Rule 29, entitled, "Supersedeas", and, as far as material, reads as follows:

"Supersedeas bonds * * * must be taken with good and sufficient security that the plaintiff in error * * * shall prosecute his writ * * * to effect, and answer all damages and costs if he fail to make his plea good."

Section 1666, the supersedeas statute, reads as follows:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days."

Section 1660, which provides for the bond to be given on writ of error, as far as material, reads as follows:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by directions of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

The bond in the case at bar contained the conditions provided for, in order to a supersedeas, in Section 1660 and Rule 29, *supra*. (Trans. p. 122.)

The Minneapolis Civic & Commerce Association on October 19th, while the case was in the Supreme Court of the

United States, as above noted, in aid of execution of the judgment of the court, moved the trial court for an order setting aside its order staying the judgment, in order that the switching rates in question might be ineffective, and this in a case "where the writ is a supersedeas and stays execution." Section 1660, *supra*.

Is not this like executing the prisoner in a capital case, permitting him, nevertheless, to review the judgment of conviction?

THE EFFECT OF A WRIT OF ERROR, TOGETHER WITH A COMPLIANCE WITH SECTIONS 1666, 1660, AND RULE 29.

The effect of a writ of error, which may be a supersedeas, is to bring up the whole record to the United States Supreme Court, and to supersede the jurisdiction of the subordinate court.

Slaughterhouse Cases, 10 Wall. 273, 19 L. Ed. 915.

Draper v. Davis, 102 U. S. 370.

The effect of a writ of error issued under Section 22 of the Judiciary Act (1653 Compiled Statutes 1913) is to bring up the whole record and subject to review all the proceedings in the cause.

Fitzpatrick v. Flannagan, 106 U. S. 648, 660.

Enc. of U. S. Reports, Vol. 2, p. 275, et seq., cases cited; Vol. 11, p. 335, et seq., cases cited.

The writ of error brings the record into the United States Supreme Court and submits it to a re-examination.

Cohens v. Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257.

A writ of error has the effect to remove the record into the court granting the writ, and when the conditions prescribed in twenty-third section of the Judiciary Act are complied with (Section 1666 U. S. Compiled Statutes 1913) the jurisdiction of the subordinate court is suspended until the case is remanded from the appellate tribunal.

Slaughterhouse Cases, *supra*.

Ensminger v. Powers, 108 U. S. 292, 27 L. Ed. 732.

After the allowance of an appeal and an acceptance of the supersedeas bond by one of the judges, in accordance with the order allowing the writ of error, the jurisdiction is transferred from the court below and from that time the case is cognizable only in the Supreme Court of the United States.

Keyser v. Farr, 105 U. S. 265, 26 L. Ed. 1025.

Enc. of U. S. Sup. Ct. Rpts., Vol. 2, p. 276, cases cited.

The control of the court below over its decree is suspended during the pendency of the appeal.

Ensminger v. Powers, *supra*.

A writ of error to a state court has the same effect on the judgment as if the judgment had been rendered in the Federal Court.

Slaughterhouse Cases, 10 Wall. 273.

Enc. of U. S. Sup. Co. Repts., Vol. 2, p. 278, cases cited.

Note the following text:

"A writ of error issued under the twenty-fifth section of the judiciary act is in the nature of a commis-

sion by which the judges of one court are authorized to examine a record upon which a judgment or decree was given in another court, and on such examination to reverse or affirm that judgment or decree. When regular in form, and duly served, the writ of error operates upon the record of the court to which it is addressed in the case described in the writ, and it has the effect to remove that record into the court granting the writ of error and to submit it to re-examination, and the twenty-third section of the judiciary act provides to the effect that where all the conditions prescribed in that section concur in the case the jurisdiction of the court where the record remained when the writ of error was sued out and served shall be suspended until the cause is determined by or remanded from the appellate tribunal."

Enc. of U. S. Sup. Ct. Repts., Vol. 1, p. 791, cases cited.

Section 25 of the judiciary act referred to in the above excerpt is Section 1662 U. S. Compiled Statutes 1913, and reads as follows:

"Writs of error from the Supreme Court to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

As bearing upon the effect at common law of a writ of error and the legislative history and effect of a supersedeas, attention is called to the language of the court, as follows:

"At common law, a writ of error was a supersedeas by implication. Bac. Abr. tit. Supersedeas, D. 4. To avoid the effect of this rule, the act of 1789 (1 Stat. 85, sect. 23) provided that a writ of error 'shall be a supersedeas, and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record

remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of; and in cases where a writ of error might be a supersedeas no execution could issue for ten days.

Under this section it was held, in *Hogan v. Ross*, 11 How. 297, that there was no authority 'to award a supersedeas to stay proceedings on the judgment of an inferior court upon the ground that a writ of error is pending, unless the writ was sued out within ten days after judgment and in conformity with the provisions of the act'; and in *Railroad Co. v. Harris*, 7 Wall. 575, that the effect of the writ as a supersedeas 'depends upon compliance with the conditions imposed by the act,' and that 'we cannot dispense with that compliance in respect to lodging a copy for the adverse party.'

The stay of proceedings followed as a matter of right from the issue and service of the writ of error in the manner and within the time proscribed by the act. No special directions as to the security were necessary, because, under the law as it originally stood, security must be given in all cases when the writ was issued, that the plaintiff in error would prosecute his writ to effect, and answer all damages and costs if he failed to make his plea good. It soon became manifest, however, that, in cases where there was to be no supersedeas, security to this extent was unnecessary; and, consequently, in 1794, it was enacted (1 Stat. 404) 'that the security to be required and taken on the signing of a citation on any writ of error, which shall not be a supersedeas and stay execution, shall be only to such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error.' After this the form of the security became material, and the supersedeas was made to depend upon the condition of the bond executed at the time of the signing of the citation, as well as upon the prompt issue and service of the writ. *Rubber Co. v. Goodyear*, 6 Wall. 156; *Slaughterhouse Cases*, 10 Wall. 289, 291."

Kitchen v. Randolph, 93 U. S. 86, 87, 88.

Section 23, the supersedeas statute referred to in said excerpt, is now section 1666 U. S. Comp. St. 1913.

Attention is called to the following:

"Where the writs of error are seasonably sued out and served, and the parties in whose favor they are granted comply in each case with all the conditions prescribed in the act of congress as necessary to give the writ effect as a supersedeas and stay execution, such proceedings operate as a stay of execution, and it is well settled that if the subordinate court, under such circumstances, proceeds to issue final process, it is competent for the federal supreme court to issue a supersedeas, as an exercise of appellate power, to correct the error. *Stockton v. Bishop*, 2 How. 74, 75, 11 L. Ed. 184; *Slaughterhouse Cases*, 10 Wall. 273, 292, 19 L. Ed. 915."

Enc. of U. S. Sup. Ct. Rpts., Vol. 11, p. 338.

Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237.

Hogan v. Ross, 11 How. 293.

TO PRESERVE ITS JURISDICTION, THE SUPREME COURT OF THE UNITED STATES MAY ISSUE ITS PROPER WRIT OF SUPERSEDEAS, MANDAMUS, INHIBITION OR PROHIBITION.

Ex Parte Mil., etc., R. Co., 5 Wall. 188, 18 L. Ed. 676.

Ex Parte Warmouth, 17 Wall. 64, 67, 21 L. Ed. 543.

Penhallow v. Doane, 3 Dallas 53, 87, 1 L. Ed. 507.

Bronson v. La Crosse, etc., R. Co., 1 Wall. 405, 410; 17 L. Ed. 616.

Green v. Van Buakerk, 3 Wall. 448.

Stockton v. Bishop, 2 Howard 74.

Hogan v. Ross, 11 Howard 293.

See, re Noyes, 121 Fed. 209.

**THE PRACTICE ON REVIEW OF AN ORDER OF THE INTER-
STATE COMMERCE COMMISSION—AN ANALOGY.**

The plaintiffs in error insist that in perfecting the appeal to the United States Supreme Court they have complied with all the provisions of law in order to stay the judgment and the effect thereof, which was to declare invalid the local switching rates which are the subject matter of the litigation. The manifest purpose of the railway companies is to maintain the status quo pending the decision of the highest court of the land. They have willingly submitted to an order requiring the allocation of the funds; they have sought and obtained requisite relief under Section 4200, and the order made by the trial court under said section was in full force and effect at the time of suing out the writ of error from the United States Supreme Court to review the judgment of the Supreme Court of Minnesota; and by complying with the pertinent rule of the United States Supreme Court and the pertinent Federal statutes the writ of error is a supersedeas.

Let us now note the analogy between the instant case and the case reviewing a decision of the Interstate Commerce Commission. By the Act of October 22, 1913, Chapter 32, the Commerce Court was abolished and the jurisdiction vested therein was transferred to the United States District Courts. Section 992 U. S. Comp. St. 1913, et seq.

Section 997, *Idem*, reads as follows:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Inter-

state Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit."

The power of the court under said section to stay or suspend the operation of the order pending the appeal, corresponds to a like power in the local District Court under Section 4200, *supra*, and Sec. 4192 G. S. 1913.

Section 999, *Idem*, provides as follows:

"A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court."

Where Commerce Court is used in said Sections 997 and 999, District Court should be substituted pursuant to the Act of Congress of date October 22, 1913.

The pertinent provisions of Section 999, in order to a supersedeas, in a case coming peculiarly within said section, that is, a rate case on appeal from a decision of the Interstate Commerce Commission are entirely analogous with the pertinent provisions in order to a supersedeas of Rule 29, and Sections 1666 and 1660, *supra*, in a case coming peculiarly within the same.

Just as the United States District Court would not have jurisdiction to vacate a stay order lawfully made under Section 997 after its final judgment had been lawfully superseded under Section 999, so the District Court of Hennepin county would not have jurisdiction to vacate a stay order lawfully made under Section 4200 after its final judgment had been superseded by writ of error from the United States Supreme Court, said writ being a supersedeas. Confessedly, if the judgment of the Supreme Court of the state is superseded, the judgment of the District Court of Hennepin county is superseded likewise.

The case of *State ex rel., Railroad and Warehouse Commission v. M. & St. L. R. R. Co.*, 80 Minn. 191, was a rate case, which was appealed to the U. S. Supreme Court. The record shows that the writ of error was a supersedeas. The same statutes were effective then as now. The status quo of the rates was maintained pending the mandate from the U. S. Sup. Court. (186 U. S. 257.)

THE ORDER OF DECEMBER 7TH IS NOT A COLLATERAL MATTER.

The history of rate legislation and litigation arising thereunder, shows that the question whether rates established by decree of a lawfully constituted tribunal shall be effective pending the final determination by the court, is a substantial and not a collateral matter.

U. S. v. B. & O. R. Co., 225 U. S. 306, 56 L. Ed. 1100.

Proctor & Gamble v. U. S. 225 U. S. 282, 56 L. Ed. 1091.

The judgment in the case at bar is not, strictly speaking, a money judgment. It is a decree of the court by virtue of which, if not superseded, new rates will be promulgated. The validity of these rates is the very essence of the controversy, this is a substantial thing, and mere statement of the proposition carries its own conviction. It might as well be argued that an injunctive order made by the commerce court under Section 997 (998) is a matter entirely collateral, not substantial, and not the basis for any relief by the aggrieved party, as to contend that the suspended order of December 7th is collateral and not substantial. The subject matter of making the judgment effective goes to the essence of the thing litigated.

Defendant in error blows hot and cold when it says in one breath, as it must, that we have superseded the judgment, and in another breath, an order vacating an order staying a judgment has nothing to do with the supersedeas. The one thing is the antithesis of the other. Where there is supersedeas, no execution, or order in aid of execution, may issue, and where execution, or an order in aid of

execution, as is the order of December 7, may issue, there is no supersedeas. "The effect of a supersedeas is to preserve the status in quo pending the determination of the appeal." 2 Cyc. p. 908, cases cited.

There are some things that a court may do under its equity powers after a judgment has been superseded. The court would have the power, for example, in the case at bar to order that the funds accruing from the switching charge in question be paid into court, or to the Railroad & Warehouse Commission, in order that said funds might be conserved. In this connection attention is called to the following:

"A stay extends only to proceedings touching the enforcement or carrying into effect the judgment or decree appealed from. It does not discharge interlocutory orders made for the preservation of the property; it does not discharge from custody a defendant arrested and committed before its service; it does not extend the lien of the judgment beyond the time prescribed by statute; it does not prevent a rule nisi for judgment; it does not prevent respondent from filing transcripts of the judgment appealed from; it does not prevent the prosecution of collateral or independent proceedings; and it does not prohibit the clerk below from issuing his fee-bills to collect the cost in the cause. But a notice of the entry of judgment is a proceeding in the cause within the meaning of an order staying proceedings on the judgment, and will be set aside as irregular."

2 Cyc., p. 910 et seq., cases cited.

Just as a notice of the entry of judgment is in violation of an order staying proceedings so the order of December 7th which makes the judgment effective, is in violation of the supersedeas.

Note the following:

"To guard against misconstruction in respect to the powers of a court having jurisdiction over the subject matter, and where a decree has been rendered affecting the property in litigation and an appeal is taken to this court, as the property in controversy is not brought into the appellate tribunal, but remains in the custody and care of the court below, it is agreed that full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss."

Enc. of U. S. Supt. Ct. Rpts., Vol. 2, p. 284.

Bronson v. La Crosse, etc., R. Co., 1 Wall. 405, 410; 17 L. Ed. 616.

While the judgment of the court below in a capital case prescribing that the punishment be death, is not vacated by the writ of error, nevertheless the execution is stayed pending proceedings on appeal.

Schwab v. Berggren, 143 U. S. 442; 36 L. Ed. 218.

Trezza v. Brush, 142 U. S. 160; 35 L. Ed. 974.

The order of December 7th is in execution of the judgment and so is substantial, not collateral, and impinges a right under the supersedeas. The effect of the order is to no longer stay execution.

THE DOCTRINE OF LOUISVILLE & NASHVILLE RAILWAY COMPANY VS. BEHLMER, 169 U. S. 644.

The syllabus of this case reads as follows:

"The provision in § 16 of the act of February 4, 1887, as amended by the act of March 2, 1889, c. 382, that appeals from judgments of Circuit Courts in such cases to this court shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon, does not refer to an ap-

peal from a judgment of a Circuit Court of Appeals to this court; and such an appeal to this court from such a judgment of a Circuit Court of Appeals operates as a supersedeas."

This was a rate case, and the facts were as follows:

"Henry W. Behlmer filed a petition before the Interstate Commerce Commission, which resulted in an order requiring the Louisville and Nashville Railroad Company and other companies to abstain from charging, demanding, collecting or receiving any greater compensation in the aggregate for transportation of hay or other commodities carried by them under circumstances and conditions similar to those appearing in the case, from Memphis, Tennessee, to Summerville, South Carolina, to that contemporaneously charged and received for the transportation of hay and other commodities from Memphis to Charleston, South Carolina. The companies having failed to comply with that order, Behlmer filed his petition in the Circuit Court of the United States for the District of South Carolina, setting out the action before the Commission, and the failure of the companies to comply with the order; and prayed for a writ of injunction or other process restraining the companies from continuing in their violation and disobedience to said order.

On final hearing the Circuit Court entered a decree dismissing the bill. 71 Fed. Rep. 835. Behlmer appealed to the Circuit Court of Appeals for the Fourth Circuit and that court reversed the decree of the Circuit Court and directed that the order of the Interstate Commerce Commission be enforced. 42 U. S. App. 581.

An appeal was then allowed and perfected to this court, which operated as a supersedeas, and Behlmer now moves the court to declare the appeal not to have that effect; or to vacate the supersedeas resulting from the allowance of the appeal and the approval of the bond tendered."

Idem, p. 645.

Behlmer's motion was denied, the point being that the case had properly gone first, to the Circuit Court of Appeals under the provisions of the judiciary act of March 3, 1891, and from the Circuit Court of Appeals to the Supreme Court of the United States under the rules and regulations providing for a supersedeas.

By the same token and for the same reasons, the judgment in the case at bar is superseded.

The defendant in error will probably call to the Court's attention the following language of the opinion in said case:

"But such appeal (to C. C. A.) would not operate to supersede the decree of the trial court, nor would such decree be superseded if the case were brought to this court from the Circuit Court of Appeals, even though the judgment of the latter court were superseded."

Idem, page 647.

This language of the court was justified under and by virtue of the provisions in Section 16, referred to in the syllabus, *supra*. The quoted language can have no application in the instant case, because Section 4200 was, in fact, complied with by the plaintiffs in error, and the judgment of the District Court of Hennepin county, and the effect thereof, was in all respects superseded.

The judgment of the District Court of Hennepin county was removed to the Supreme Court of Minnesota by virtue of the appeal and a compliance with Section 4200. In this connection attention is called to Section 7903 G. S. 1913 (Minnesota) which reads as follows:

"A judgment or order in a civil action in a District Court may be removed to the Supreme Court by appeal, as provided in this chapter, and not otherwise."

RULE IN EQUITY SUITS.

In *Hovey v. McDonald*, 109 U. S. 150, the definition and effect of a supersedeas was again stated, the court observing that the proceedings in said cause were in equity and not governed by the rules regulating a supersedeas of execution. This same rule, following the Chancery practice in England, is now regulated by Section 129 of the Judicial Code, which is Section 1121 U. S. Compiled Statutes 1913. The case at bar is a law case, involving the reasonableness of switching charges.

THE RELIEF ASKED FOR IN THE SUPREME COURT OF MINNESOTA WAS A CONCURRENT REMEDY AND NOT A BAR TO RELIEF IN THIS COURT.

Counsel on the other side have intimated that it would be claimed in their behalf that the application of the Railway Companies to the Supreme Court of Minnesota for a prohibition was an exclusive remedy and is a bar to relief in this court.

It is submitted that this position is untenable. It is not only the right, but the duty of the Railway Companies to exhaust their remedies and redress their grievances. It is their duty, likewise, by all remedies available to protect the jurisdiction of this court. It seems that it ill becomes the defendant in error to proceed as in contempt of

this court, and then claim that because a concurrent remedy was sought out, it was in bar of a remedy in this court whose jurisdiction had been violated.

If the Railway Companies understand aright the obligations of the supersedeas, it is their duty to call to this court's attention the fact that the defendant in error has applied to an inferior court, has obtained an order in aid of execution, and is proceeding to execute the superseded judgment.

To say the relief asked for in the Supreme Court of Minnesota is a bar, is like saying that raising a Federal question in a state court with an adverse ruling thereon, is in bar of a remedy in this court.

The truth is the plaintiffs in error moved the Supreme Court of Minnesota for a prohibition, believing such relief was compellable as matter of right, that a prohibition would be granted and it would therefore be unnecessary to apply to this court. The purpose was largely to relieve this court of the burden.

The remedy in the state court was prayed for and exercised under Section 121 G. S. 1913, (Minn.) which reads as follows:

"The (Supreme) court shall have power to issue to all courts of inferior jurisdiction, and to all corporations and individuals, writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes, whether especially provided for by the statute or not, that are necessary to the execution of the laws and the furtherance of justice. It shall be always open for the issuance and return of such writs and processes, and for the hearing and determination of all matters involved therein, subject to such regulations as it may prescribe. Any justice of the court, either in vacation or in term, may order the writ or

process to issue, and prescribe as to its service and return."

This statute corresponds to Section 716 R. S., which reads as follows:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

(Section 1239 U. S. Comp. St. 1913.)

In *Goddard v. Ordway*, 94 U. S., 672, the court said:

"A supersedeas * * * operates to stay the execution of the decree appealed from. When this appeal was taken, the only execution there could be of the decree below was the collection of the cost and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, a further order of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction.

A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the supersedeas, we may, under sect. 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be 'a writ necessary for

the exercise of our jurisdiction.' The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise."

To the same effect, we again cite:

Ex Parte Mil., etc., R. Co., 5 Wall. 188, 18 L. Ed. 676.

Ex Parte Warmouth, 17 Wall. 64, 67, 21 L. Ed. 543.

Penhallow v. Doane, 3 Dallas, 53, 87, 1 L. Ed. 507.

Bronson v. La Crosse, etc., R. Co., 1 Wall. 405, 410;
17 L. Ed. 616.

Green v. Van Buskerk, 3 Wall. 448.

Stockton v. Bishop, 2 Howard 74.

Hogan v. Ross, 11 Howard 293.

See, re Noyes, 121 Fed. 209.

State v. Johnson, 29 La. Ann. 403, 405.

3 C. J. 1327, 1328, cases cited.

In view of the foregoing, and upon general principles, we submit that this court will preserve its jurisdiction in the premises, and properly and necessarily will not allow that jurisdiction to be interfered with merely because the plaintiffs in error have exercised a concurrent remedy in moving the Supreme Court of Minnesota for a writ of prohibition.

The decision on the writ of prohibition is not binding on this court, as an estoppel, *res adjudicata*, or otherwise.

CONCLUSION.

It is submitted that the trial court was without jurisdiction to make the order of December 7th; that said order should be prohibited from becoming effective, and a writ of supersedeas should issue.

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MAY 4 1918

JAMES D. WAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 283.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS
& OMAHA RAILWAY COMPANY, MINNEAPOLIS
EASTERN RAILWAY COMPANY, PLAINTIFFS IN
ERROR,

vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

LYNDON A. SMITH,

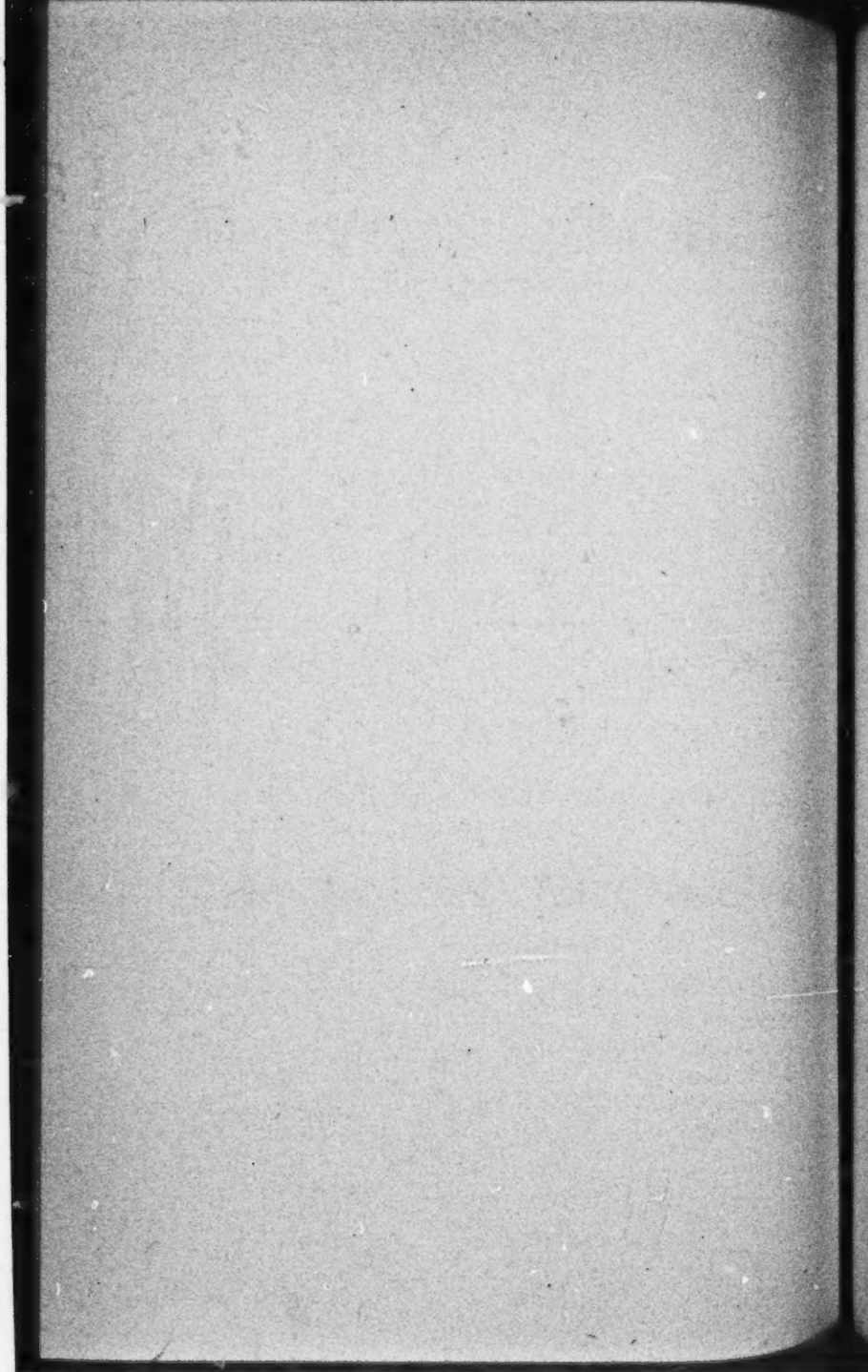
Late Attorney General of Minnesota,

CLIFFORD L. HILTON,

Attorney General, and

FRANK J. MORLEY,

Attorneys for Defendant in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 283.

**CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS
& OMAHA RAILWAY COMPANY, MINNEAPOLIS
EASTERN RAILWAY COMPANY, PLAINTIFFS IN
ERROR,**

vs.

**MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,
DEFENDANT IN ERROR.**

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

In the reply brief of counsel for the Omaha, certain new points are presented which we had no opportunity to discuss on the oral argument, and which, of course, are not answered in our main brief. Consequently we applied for leave to file this supplemental brief. On page 10 of his reply, counsel refers to the cost of the Minneapolis Eastern property, stat-

ing that the book cost was \$412,716, and cost of reproduction \$1,088,390. This testimony was apparently referred to as supporting the contention that the service performed in making deliveries to the industries on the Minneapolis Eastern was different and of greater value than that performed in making deliveries to the industries on the rails directly owned by the two line companies. Otherwise, we fail to see its pertinency. The Railroad Commission found that the service performed was substantially the same (Record, bottom of page 6), and the district court made the same finding (Record, page 97). As we view the matters these findings as to the comparative service are *findings of fact*, which if based upon evidence are not open to review. Los Angeles Switching Case, 234 U. S., 294, 311.

In the State Supreme Court counsel had contended that this finding was not sustained by evidence, but they made no such contention in their opening briefs in this court, and we, therefore, assumed that the contention had been abandoned (brief of defendant in error, bottom of page 3.) Testimony was concededly before the Railroad Commission and district court, showing the conditions under which the cars were handled as they came in over the rails of the line companies, and were switched to the industries on their own rails in Minneapolis and likewise to the industries on the rails of the Minneapolis Eastern (Record, ff. 114-122; 128-129; 135-137; 139-141; 153-155; 219-220), and the witnesses of each line company admitted that if the industries on the Eastern were in fact on their own rails the line companies would, as a matter of course, make deliveries thereto for their line rates without any additional switching charge (Record, ff. 121, 154). The Supreme Court of Minnesota, in its opinion, so stated (Record, top of page 109). In other words, the only justification claimed on the hearing in the district court was the separate corporate entity of the Minneapolis Eastern Railway, not the fact of alleged additional service.

Furthermore, the figures as to valuation of the Eastern, relied upon by counsel, as he very courteously conceded on

the oral argument, were excluded by the district court. They were contained in Exhibit 5, and upon our objection and for the reasons stated in the record, the exhibit was ruled out by the court (Record, ff. 184-188, particularly f. 188). And the valuation put upon the property by the State, to which counsel also refers, of \$604,000, includes both the property on the east and on the west side of the river (Record, page 82), but the property on the east side, as counsel concede, is not and never has been operated by the Eastern Railway, but is, and for many years has been, operated by the Great Northern Railway under claim of title (Record, f. 200). The west side was valued by the State at approximately \$500,000, and this valuation is, of course, largely due to the fact that it penetrates into the heart of the milling district, thereby reaching traffic which is exceedingly lucrative.

On page 13 of his reply, counsel for the Omaha says that we incorrectly assume that the Omaha and Milwaukee Companies absorb the charges of the Eastern Railway on all outbound business and also says that each line company absorbs some of the charges of the Eastern Railway on the inbound grain. He says that the Commission and district court are in conflict on this matter and that neither is entirely right. We think there is no real conflict between Commission and court, but that the conflict is in fact between the counsel themselves. Counsel for the Omaha says that neither company absorbs on all outbound business; counsel for the Milwaukee admits on page 12 of his reply that both do. Counsel for the Omaha says that each company absorbs some charges of the Eastern on inbound grain (Omaha Reply, page 13). Counsel for the Milwaukee admits that neither does (Milwaukee Reply, page 12). But the conflict between Commission and court and between counsel themselves is imaginary rather than real. The Commission found that on outbound business each line com-

pany absorbed all the charges of the Eastern Railway, and that "*from a practical standpoint*" shippers of inbound grain were the only persons who had to pay its switching charges (Record, f. 71). The district court qualified this finding by reference to the Milwaukee Tariff, providing that on all outbound traffic, where the earnings equal \$15 per car, the switching charges of the Eastern would be absorbed (Record, page 97). Flour is the principal outbound traffic of the Eastern Railway (Record, bottom of page 96). And the instances where the earnings for a line haul of a carload of flour do not equal \$15 are of course negligible. *From a practical standpoint*, therefore, the Commission was right; the line companies do absorb on all outbound traffic; and counsel for the Milwaukee, realizing this fact in his reply brief, concedes that on all outbound business the charges are absorbed.

As to the inbound grain, the counsel, in stating that the Milwaukee now absorbs some of the charges of the Eastern on inbound grain, overlooks the express exception to its tariff at page 87 of the record; and the Omaha tariff (page 13 of his reply), upon which he relies to support his contention as to the practice on that railroad, is not contained in the printed record. It constituted Exhibit 9 before the district court, but that Exhibit was omitted in the preparation of the record here (Record, pages 173, 174). Whether there is an express exception as to grain in that tariff, we cannot therefore state.

In subdivision VI of his reply brief (page 14) counsel for the Omaha further says that the order is arbitrary and unreasonable because it applies to only 2.63 miles out of a total trackage of 5.13 miles owned or leased by the Eastern Company. As we have previously stated, there is 2.10 miles of trackage on the east side of the river not operated by the Eastern Company at all, but operated by the Great Northern Railroad under claim of title. Of course the Commission made no order as to this latter trackage.

• He also, at page 15 of his reply, claims that the order affects charges of the Eastern Railway for switching from connecting lines to the Omaha and Milwaukee Companies, which charges he claims the connecting lines absorb. We think there is no support in the record for this claim on the part of counsel that these charges are absorbed by the connecting lines.

As to the proposition urged by counsel for the Omaha on page 4 of his reply that the order of the Commission must stand or fall on the findings of fact, and that the contract of October 25, 1878, was not mentioned in the findings and therefore should be ignored, that proposition might properly have been urged before the Supreme Court of the State, but seems to have no proper place in the argument here. Whether the State Supreme Court could go behind the findings and consider uncontroverted testimony not mentioned therein would seem to present purely a question of State practice. And counsel also overlooks the fact that the memorandum of the district judge, *which was expressly made a part of its order* (Record, f. 256), refers to the contract (Record, f. 255).

Mr. Justice McReynolds on the oral argument inquired whether the Omaha Railway had any direct connection with the tracks of the Eastern and was advised that it did not; that it operated over tracks leased from the Great Northern Railway in order to reach the Eastern road; and inquiry was made by him how the Omaha could comply with the order of the Commission after the expiration of the lease. Upon that point we suggest that if as applied to the present situation the order of the Commission does not violate the Constitution, while as applied to the situation which would arise after the expiration of the lease it would be so unreasonable and arbitrary as to violate it, this court should assume until

the contrary is made to appear that the State will not give to the order the unreasonable and arbitrary construction suggested. The decisions of the State court would seem to indicate that the Omaha would not be required to renew the lease. *Banner Grain Company vs. Great Northern Railway*, 119 M., 68, 72. We would further say that under the decisions of the State court, so long as the lease from the Great Northern continues in effect, the Omaha Railway in operating thereon is operating over its own rails. *Banner Grain Co. vs. Great Northern Railway, supra.*

Respectfully submitted,

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CLIFFORD L. HILTON,
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FRANK J. MORLEY,
Attorneys for Defendant in Error.

APR 24 1918

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1916.

No. **288**

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-
PANY, CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY AND MINNEAPOLIS
EASTERN RAILWAY COMPANY,

Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,
Defendant in Error.

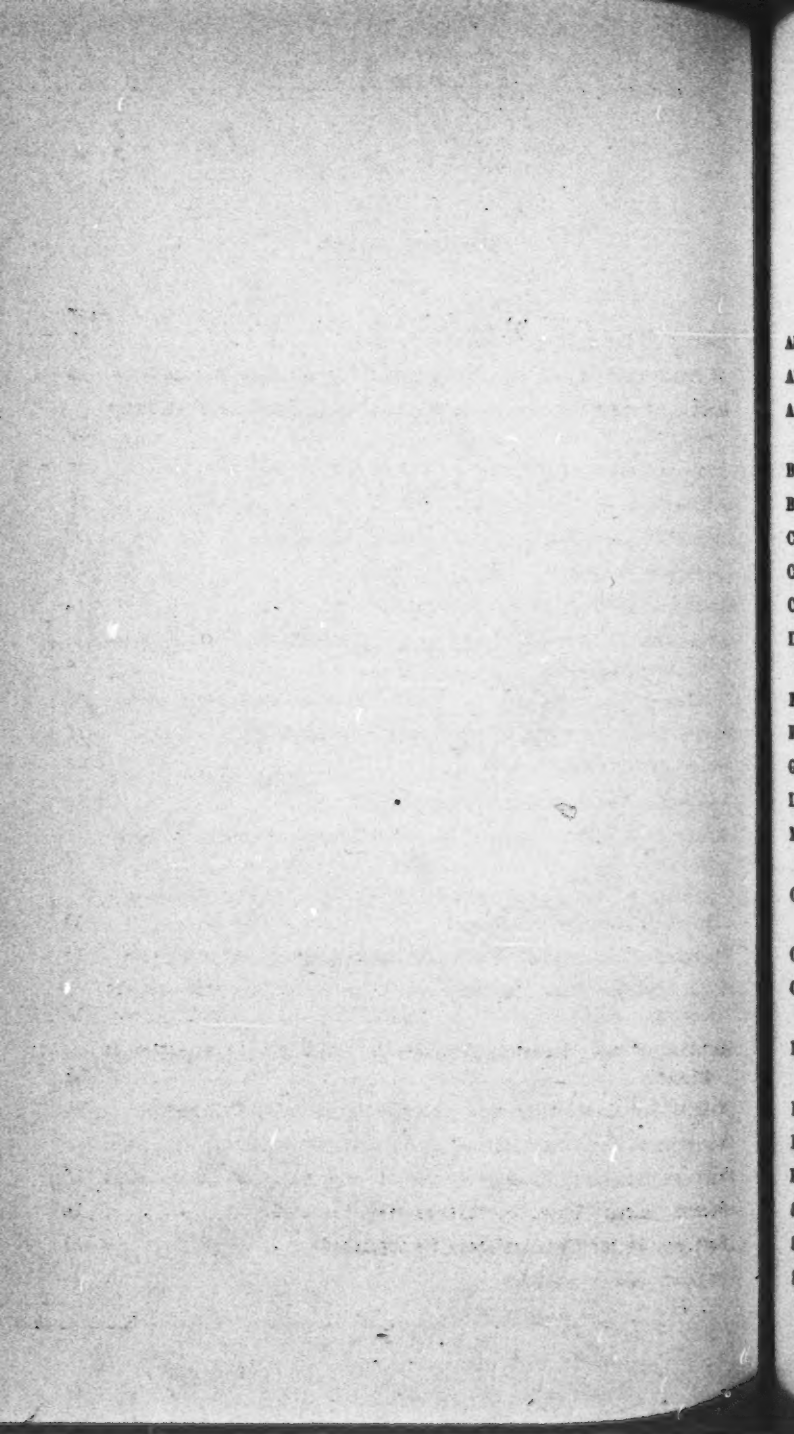
IN ERROR TO THE SUPREME COURT OF MINNESOTA.

**REPLY BRIEF OF THE CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY.**

O. W. DYNES and

F. W. ROOT,

Attorneys for said Plaintiff in Error.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 712

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY AND MINNEAPOLIS
EASTERN RAILWAY COMPANY,

Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

REPLY BRIEF OF THE CHICAGO, MILWAUKEE &
ST. PAUL RAILWAY COMPANY.

MAY IT PLEASE THE COURT:

In the belief that we may be able to clarify certain of the issues dealt with in the brief of defendant in error and better define our position on such issues, this reply is submitted.

I.

THE WRITTEN CONTRACT BETWEEN THE MINNEAPOLIS EASTERN, PARTY OF THE FIRST PART, AND THE LINE CARRIERS, PARTIES OF THE SECOND PART.

Opposing counsel, at page 10 of their brief, say of the contract set forth at pages 141 to 144 of the record:

"By a supplemental contract bearing date December 20, 1878, it was provided that the foregoing contract should remain in full force in all its terms and provisions until the first of May, 1918. It was therefore in full force and effect at the time the order of the Commission was made and is still in effect."

It is clearly an erroneous statement, in direct conflict with the facts and the law, to say the contract referred to was in full force and effect at the time the order of the Commission was made, and is still.

The Act to Regulate Commerce, passed nine years after the contract was entered into, together with its amendments, nullified as to interstate commerce all clauses of the contract inconsistent with that law so far as interstate transportation is concerned. Minnesota laws regulative of intrastate commerce, also passed subsequent to the date of the contract, had the same effect as to intrastate commerce, among which latter laws is Section 4332 of the General Statutes of Minnesota, 1913, which provides:

"It shall be unlawful for any common carrier to make or give any unequal or unreasonable preference or advantage."

Also Section 4334, which provides:

"It shall be unlawful for any common carrier in this state by any special rate, rebate, drawback or other device to directly or indirectly charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service

rendered in the transportation of any property within the state than its regular established schedule of rates and charges for like and contemporaneous service for any other person or for the public generally."

Also Section 4362, which provides:

"All railroad companies shall give the same facilities to local or state as to interstate traffic."

This latter section must be construed with relation to Section 3 of the Act to Regulate Commerce, which reads in part as follows:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for interchange of traffic between their respective lines and for the receiving, forwarding and delivering of
 • • • property to and from their several lines and those connecting therewith and shall not discriminate in their rates and charges between such connecting lines."

No clause of the contract in conflict with any of the laws cited above, or any other laws, state or federal, has been enforced since the law with which it conflicts was enacted. No such clause of the contract was in full force and effect at the time the proceeding was pending before the Commission or at the time the Commission's order was entered. The evidence of record supports this statement and there is not a scintilla of evidence disputing it.

Though the terms and conditions of the contract in question were lawful when the contract was entered into in the year 1878, various of those terms became unlawful because of subsequently enacted laws. In the case of *L. & N. R. R. v. Mottley*, 219 U. S., 467, the court, in dealing with the terms of a similar contract, at page 485, said:

"As the contract in question would have been illegal if made after the passage of the Commerce

Act, it cannot now be enforced against the railroad company even though valid when made."

On the same page the court quotes with approval the following:

"If one agrees to do a thing which it is lawful for him to do and it becomes unlawful by an act of the legislature, the act avoids the promise."

To the same effect is *N. Y. C. & H. R. v. Gray*, 239 U. S., 583.

Instead of being in full force and effect, as argued by opposing counsel, the criticized terms and conditions of the contract were made void by legislation and were abandoned by the parties long before the State Commission entered its order.

The emasculated contract will expire by its terms May 1, 1918. How then can counsel urge the contents of the contract in support of an order which is not limited to the same period of time as the contract but which, if held valid, will continue through the future after the contract, by its time limitations, is ended.

II.

POINTS OF DISTINCTION BETWEEN THE INSTANT CASE AND THE CASE OF UNITED STATES V. D. L. & W. R. R., 238 U. S., 516, RELIED UPON BY OPPOSING COUNSEL.

Defendant in error apparently relies on the decision in *United States v. D. L. & W. R. R. Co.*, 238 U. S., 516, as a governing precedent for the case at bar. We wish to briefly direct attention to a few of the features that distinguish this case from the case cited, both in respect of legal principles and facts involved.

(1) An important feature of the general public policy established by the Sherman Law and defined by the Com-

modities Clause in Section 1 of the Act to Regulate Commerce was violated, with injurious consequences to the public, in the D. L. & W. case. In the case at bar no question of public policy is involved since the identical switching charge the Commission has ordered discontinued would have been made and paid in all cases had the stockholders and directors of the Minneapolis Eastern been composed of men and concerns entirely disconnected from the Omaha and Milwaukee Roads.

(2) In the D. L. W. case the railroad and Coal Company were performing under illegal clauses of a contract and in so doing were violating the statutes which made the clauses illegal. In the case at bar every clause of the original contract which had become illegal by legislation enacted subsequent to the date of the contract was abandoned by the plaintiffs in error. Not a single unlawful clause of their contract was being carried into execution.

(3) The purpose of the proceeding in the D. L. & W. case was to compel the Railway Company and the Coal Company to desist from performing illegal provisions of their contract that violated a defined public policy. In the case at bar the proceeding was to change a lawful tariff. No contract was under attack or mentioned by the complaint filed with the Commission—no contract was passed upon or considered by the Commission. It was an ordinary proceeding to regulate a published tariff rate and a published tariff rate is the lawful rate under the decisions until it is ordered canceled. In *A. T. & St. F. Ry. Co. v. Robinson*, 233 U. S., 173, 180, Mr. Justice Day, after citing decisions, said:

“We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates, and that so long as they remain operative they are conclusive as to the rights of the parties in the absence of facts

or circumstances showing an attempt at rebating or false billing. To give to the oral agreement upon which the suit was brought the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the state, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained, then the door is open to all manner of special contracts departing from the schedules and rates filed with the Commission. To maintain the supremacy of such oral agreements would defeat the primary purposes of the interstate commerce act so often affirmed in the decisions of this court which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

The law of Minnesota is not different from the interstate law in this regard. Section 4334, General Statutes of Minnesota, 1913, provides:

"It shall be unlawful for any common carrier in this state * * * to directly or indirectly charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered in the transportation of any property within this state than its regular established schedule of rates and charges. * * *"

(4) In the D. L. & W. case the Coal Company, with which it contracted, was not left free to, and did not in fact, conduct business with other purchasers and consumers of its product on an equal basis with the contracting railroad. In the case at bar the Minneapolis Eastern was free to, and did, perform services for all roads and all shippers on the same basis as for the Omaha and Milwaukee roads.

(5) In the D. L. & W. case the officers of the two contracting corporations were the same individuals. In the case at bar the reverse is true.

(6) In the D. L. & W. case the court reasoned, at page 528, that unity of management is an evil only where one of three things exists:

- (a) Menace to minority stockholders.
- (b) Interests of third persons are imperiled, and
- (c) The rights of the public in danger of being transgressed.

In the case at bar there are no minority stockholders. The interests of third persons are not being imperiled. The rights of the public have not been transgressed and there is not even unity of management. The shipping public pays no more for its services because of the relationship between the Minneapolis Eastern and the other plaintiffs in error than it would pay if the relationship did not exist. No more than it is now paying when the shipments move to destinations on the Minneapolis Eastern over the rails of the Great Northern, the Northern Pacific or other disinterested Minneapolis lines.

(7) In the D. L. & W. case the court points its criticism (page 528) against the circumstance that the contract was drawn after the Commodity Clause of the Hepburn Act became the law, and the drafting of the contract and the performances under it as well, constituted a plan of continuing business in a way which the Commodity Clause made unlawful. In the case at bar, on the other hand, the contract was drawn before, and without thought of, the subsequent state and federal laws regulating railroads with which the terms of the written contract conflict, and the further fact is to be noted that instead of planning to carry out the unlawful clauses of the contract at any time (at least at any time subsequent to the enactment of the legislation which made such terms unlawful) the contracting parties abandoned them and conformed themselves to the principle of the Mottley case and the Gray case. (*L. & N. R. R. Co. v. Mottley*, 219 U. S., 467; *N. Y. C. & H. R. R. Co. v. Gray*, 239 U. S., 583.)

(8) In the D. L. & W. case the court points a further criticism against the fact (page 528) that the railway company failed to divest itself of legal title to the coal property, and, therefore, did not effect a complete separation of interest and did not create a completely separate legal corporate entity in the coal corporation. In the case at bar the Omaha and Milwaukee Roads never had legal title to the physical property of the Minneapolis Eastern. It was from the beginning technically a separate corporate entity with full legal title to its physical property and the line carriers were not liable to third persons for its debts, or *vice versa*.

(9) In general, the sufficiency and legality of a contract of sale and the conveyance of title were what the court passed upon in the D. L. & W. case, while in the case at bar there was no contract of sale of property or conveyance of title thereto involved.

(10) In the D. L. & W. case if the contract was void, *ab initio*, then there never were two separate entities but all remained one and that one, the railway company. In the case at bar to wipe out the contract or hold it void could not possibly have the effect of merging the two entities into one. Even the Minnesota Supreme Court apparently reached the conclusion that the control lay in the contract from which it is clearly deducible that without the contract there is no control and entities are independent as well as separate.

(11) In the D. L. & W. case the court, at page 533, recognizes that where public interest is "not involved and the restraint upon one party is not greater than the protection to the other party requires, the contract may be sustained." In the case at bar the only restraint upon the Minneapolis Eastern, as the contract was actually carried out, had to do with incumbering or depreciat-

ing the property, which restriction is no greater than protection to the Omaha and Milwaukee for the moneys advanced to finance the Minneapolis Eastern required.

(12) In the D. L. & W. case the facts show, and the court found, that the Coal Company was restricted in its dealings so that it could buy only from the Railway Company and must sell to designated purchasers. In the case at bar, as the contract was carried out, the Minneapolis Eastern could furnish its services, and did furnish them, to all applicants therefor, carriers or shippers, without let or hindrance by the Omaha and Milwaukee Roads, and was free to purchase and contract for its supplies and did so, from whatever persons or sources it chose. In short, it was a free agent in all respects comparable with those in which the Coal Company is held to be the restricted agent of the D. L. & W.

(13) The Supreme Court of the United States concludes its opinion in the D. L. & W. case (pages 536-537) with declaring that the contract was invalid and created no new condition but was a mere nullity. In the case at bar the Minnesota courts reasoned that invalid and void clauses of the contract, though not being carried into effect by the parties, are potent and effective to create new conditions and legal obligations that are not created by or included in the valid portions of the contract.

(14) The reasoning of the court in the D. L. & W. case (page 536) indicates that a broad public interest is involved in any violation of the Commodity Clause and that a most complete independence as between the railway and the merchandising corporation should exist with the exception that the elimination of stock ownership is not necessary. In the case at bar we have not to deal with the stringent Commodity Clause nor with a contract, which as far as its terms were carried out, is in violation of any federal or state law. It is only the aban-

doned clauses of that contract that are subject to just criticism and it is only in the permissible stock ownership that the two cases have a strong resemblance.

III.

THE DISTINCTION BETWEEN SOUTHERN PACIFIC TERMINAL COMPANY V. INTERSTATE COMMERCE COMMISSION, 219 U. S., 498, AND THE CASE AT BAR. OTHER CITED CASES ALSO DISTINGUISHED.

Pages 15 to 18 of the brief for defendant in error urge the Southern Pacific Terminal Company case as a governing precedent. We will not discuss here the many obvious distinguishing features that exist between the facts involved in the two cases, but desire to direct the court's attention to the feature of unlawful discrimination and point the distinction between the case cited and the case at bar on that feature.

In the case at bar the Commission predicated unlawful discrimination solely on the theory that the Minneapolis Eastern is the terminal property of the Omaha and the Milwaukee Roads. It is on that theory, alone, that the Commission has concluded unlawful discrimination exists.

In the Southern Pacific Terminal Company case a shipper was given preferred use and privileges on the terminal in question. The carrier had allowed a single shipper to make its terminal property the property of that shipper, thereby giving to him resulting highly preferential rates on business in which he was in competition with other shippers of the same commodities. In the case at bar no shipper of inbound grain to a destination on the rails of the Minneapolis Eastern is given preferential benefits over any other shipper of grain to the

same destination. All such shippers are treated equally and alike—pay the same rates and receive identically the same services and privileges. All shippers over the Omaha and the Milwaukee lines, of grain consigned to destinations on the rails of those lines in Minneapolis, pay the same rates, receive the same service, equally and without preference or distinction. No shipper of inbound grain, whether to destinations on the rails of the Minneapolis Eastern or on the rails of either of the other plaintiffs in error, has an advantage over any other shipper, and no such shipper is in the position of the cotton shipper, E. H. Young, in the Southern Pacific Terminal Company case, who enjoyed preferences and lower rates than his competitors who were shippers of cotton to or through the port of Galveston.

United States v. Terminal Railroad Association of St. Louis, 224 U. S., 383, is cited and relied upon by defendant in error. That case involved a proceeding under the Sherman Act, 26 Stat., 209, instituted for the purpose of dissolving a consolidation of terminal railway companies alleged to be a combination in restraint of interstate commerce and a monopoly forbidden by the law. In the case at bar there is not presented a combination or consolidation of several terminal companies in one. The Minneapolis Eastern Railway was created by physical construction. It was not "combined" and is not a combination. Opposing counsel recognized and acted upon a significant distinction between the St. Louis Terminal case and the case at bar in selecting the forum and framing the complaint. Had opposing counsel believed the principles of the St. Louis case governed, they would have followed the procedure of that case and would have proceeded in a forum which possessed full power to dissolve unlawful combinations and decree their reconstruction on a lawful plan. In the St. Louis case the court found dis-

crimination against localities due to the operation of the combine. East St. Louis was preferred over St. Louis. Defendant in error has woven into its argument, in a way likely to confuse, the suggestion that there is unlawful discrimination in the circumstance of the absorption of outbound switching charges by the Milwaukee and Omaha Roads, as by all other roads, from points of origin on the Minneapolis Eastern while those two roads decline to make similar absorptions on inbound shipments of grain. This is a circumstance, however, that is not due to or dependent upon the existence or nonexistence of the Minneapolis Eastern. Every Minneapolis road conducts its business as do the Omaha and Milwaukee Roads in this regard. Every Minneapolis road absorbs switching charges on outbound business from industries on the switching line. Competition apparently compelled that practice. Minneapolis roads generally, like the Omaha and Milwaukee Roads, would not absorb inbound switching charges. Apparently their opposite practice in this regard is due to the absence of competition. Inbound shipments originate at a point on the inbound carrier's rails not reached by a competing carrier, but the outbound business in question originates off the rails of the line-haul carrier and on the rails of a switching road that can and does switch it to whatever outbound line the shipper wishes to patronize. This makes outbound shipments highly competitive traffic.

It is unnecessary to detail the more obvious features of distinction between the St. Louis Terminal case and the case at bar, but we would invite attention to one feature of the court's reasoning which occurs at pages 401 and 402 of the opinion:

"We are not unmindful of the essential difference between terminal systems properly so described and

railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote commerce.

* * * Referring to the legitimate use of terminal companies, the Missouri court said: 'A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would result in compelling the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff.' "

We submit the foregoing is the part, and the only part, of the opinion in *United States v. Terminal Railroad Association of St. Louis*, 224 U. S., 383, that is fairly applicable to the facts of the case at bar.

The *Los Angeles Switching Case*, 234 U. S., 294, discussed and relied upon by defendant in error, pages 33 to 39 of its brief, differs from the case at bar in that no terminal switching company, such as the Minneapolis Eastern Railway, performed the service for which the objectionable charge was made. In that case the line-haul carriers, themselves, with their own power and on their own rails, performed the terminal service for which they made an extra charge in addition to their published line-haul rates to and from the City of Los Angeles. In the case at bar neither the Omaha nor the Milwaukee Road makes any charge in addition to its published rate to Minneapolis for the delivery of inbound grain shipments to industries located on their respective rails in any part of that city. It is only where the shipments go off their rails and on to the rails of another carrier that the switching charge of \$1.50 per car is added to the published line-haul charge. The addition

of this \$1.50 switching charge is made by every railroad that hauls grain into Minneapolis and is not a charge peculiar to the service of the Omaha and Milwaukee Roads. The line-haul carriers, in transferring such terminal charges to the shipper instead of absorbing them, were not acting in conflict with the *Los Angeles Switching Case* and were acting in conformity with this court's decision in *Interstate Commerce Commission v. Stickney*, 215 U. S., 98, in which latter case, as in the case at bar, the line-haul carriers owned the stock of the delivering carrier, the Union Stock Yards Company. At page 108 of the opinion this court said:

"Further, it is shown by the affidavits that the amount of such terminal charge is not entered upon the general freight charges of the companies, but is kept as a separate item. The Union Stock Yards Company is an independent corporation and the fact, if it be a fact, that most or *even all of its stock* is owned by the several railroad companies entering into Chicago does not make its lines or property part of the lines or property of the separate railroad companies."

Opposing counsel, in attempting to distinguish the *Stickney* case, pages 39 to 41 of their brief, failed to note or deal with a most important feature found alike in the *Stickney* case and in the case at bar, namely: The line-haul rate of the carriers in the *Stickney* case provided for delivery at stockyards on their respective lines without the additional charge made when delivery was to the Union Stock Yards on the rails of the switching company just as in the case at bar the line-haul carriers provide for delivery at elevators or mills on their own rails in Minneapolis at the line-haul rate without the addition of the switching charge assessed when delivery is made to elevators or mills on the rails of the Minneapolis Eastern. A consideration of the *Stickney* case

serves to emphasize the distinction that exists between the case at bar and the *Los Angeles Switching Case*.

The distinction we have pointed out as between the *Los Angeles Switching Case* and the case at bar is again emphasized in the case of *Interstate Commerce Commission v. Chicago, Burlington & Quincy Railroad Company*, 186 U. S., 320, discussed by opposing counsel at page 33 of their brief. That the opinion in this latter case affords no support for defendant in error's contention in this case is apparent from the following language quoted from page 335 thereof:

"As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stockyards, a point beyond the lines of the respective carriers, was conceded by the Commission and was upheld by the Circuit Court of Appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the Sixth Section of the Act to Regulate Commerce, wherein it is provided that the schedules of rates to be filed by carriers shall 'state separately the terminal charges and any rules or regulations which could in anywise change, affect or determine any part of the aggregate of said aforesaid rates and fares and charges.' Whether the rule which we approve as applied to the facts in this case would be applicable to terminal services by a carrier on his own line which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper, is a question which does not arise on this record, and as to which we are, therefore, called upon to express no opinion."

The opinion in the case quoted from concludes with

an affirmance of the line-haul carriers' right to charge, in addition to their line-haul rate, \$2 per car to cover the charges of the switching line serving the stockyards, the stock of which switching line was owned by the line-haul carriers as appears in the Stickney case, *supra*.

IV.

AN INCOMPLETE AND INACCURATE STATEMENT OF OPPOSING COUNSEL ON THE QUESTION BY WHOM IS THE MINNEAPOLIS EASTERN RAILWAY OPERATED.

At page 4 of brief of opposing counsel is the following:

"The commission also found that the two-line companies 'directly influence, control and operate the Minneapolis Eastern Railway.' (Rec., 132.) Under the statute this finding also must stand unless shown by the testimony to be contrary to the actual facts."

The foregoing is a partial and misleading statement as to what the Commission actually found. It will be noted on page 132 of the record that the Commission in paragraph 9 finds the facts and recites them of record as follows:

"The Minneapolis Eastern Railway Company is managed and operated by its Board of Directors.
* * * The Company owns its own equipment and performs services for all railroads on equal terms."

The Commission has not found that the Minneapolis Eastern Railway Company is a nonoperating company as is inferable from opposing counsel's argument, page 4. It is the portion of the Commission's finding last quoted above that is in strict accord with the undisputed fact. That portion of the Commission's order partially stated and relied upon by opposing counsel is in apparent conflict with the portion of its order supported by the evi-

dence and is a deduction by the Commission in no part supported by the actual and undisputed facts of physical operation.

Section 4182 of the General Statutes of Minnesota, 1913, provides:

“The Commission shall hear evidence and otherwise investigate the matter and shall make findings of fact upon all matters involved.”

The Commission's findings of fact last quoted above are a compliance with the statute. The recital of the Commission that the Omaha and Milwaukee Roads “directly influence, control and operate the Minneapolis Eastern Railway” relied upon by opposing counsel in Division II of their argument, is merely the Commission's conclusion as to psychological influences and is not a finding of facts in respect of physical operations and, therefore, not required or authorized by the laws of Minnesota. It is *obiter dicta* in so far as the statutory requirement to find facts is concerned and *ultra vires* in so far as it assumes to be a finding of physical facts. When so regarded it cannot be given the effect of shifting the burden of proof to plaintiffs in error under the provisions of Section 4192 of the General Statutes of Minnesota, 1913, as opposing counsel contend.

V.

AN INTERFERENCE WITH AND BURDEN UPON INTERSTATE COMMERCE NOT DENIED BY OPPOSING COUNSEL.

In requiring the Omaha and Milwaukee Roads to publish rates from points of origin on their respective rails in the State of Minnesota to destinations on the rails of the Minneapolis Eastern, to which the latter road is not a party, by concurrence or by published joint rate, the

Minnesota Commission imposes burdens that a state may not lawfully impose upon interstate shipments.

In *In re Coal Rates on the Stony Fork Branch*, 26 I. C. C., 168, 173, the Commission announced a principle of interstate commerce law in the following language:

"It would be improper for one road to establish a joint rate from (or to) a point on another road without the concurrence of the latter. In *N. Y., N. H. & H. R. R. Co. v. Platt*, 7 I. C. C., 323, 332, the Commission held:

'But it by no means follows that one carrier can add to the duly established rates of another carrier any amount it pleases, less than its own local rates, and publish and use that sum as a through rate to points on the line of such other carrier. Such a through rate is neither a joint rate nor a combination rate. It is obviously not a joint rate, for joint rates can be made only by the concurrence or assent of connecting carriers. It is not a combination rate, for one of its component parts has no legal existence or sanction as a separate or local rate.'

In *Clark Co. v. L. S. & M. S. Ry. Co.*, 11 I. C. C., 558, 579, we find the following:

Every joint rate is a matter of agreement between the parties to it. This agreement must determine what rate shall be charged, what division of this rate each carrier shall receive, upon what conditions the exchange of this traffic and the adjustment of these divisions shall be conducted.

The amendment of 1906 to the act to regulate commerce provides:

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

There is no provision in the law for the establish-

ment of through rates by absorbing the local rates of another carrier for the purpose of establishing through rates over a through route composed of two or more carriers over which through route no joint through rate has been fixed by the agreement."

The Minnesota Commission has specifically found that the Minneapolis Eastern is a duly organized railroad corporation actually operating a railroad and has entered an order in conflict with what is quoted above since it requires the Omaha Road and the Milwaukee Road to publish rates to destinations on the line of the Minneapolis Eastern without providing a division thereof for the Minneapolis Eastern, without the concurrence of the Minneapolis Eastern, and without a joint rate with the Minneapolis Eastern. All of this the order requires the Omaha and Milwaukee Roads to do on intrastate traffic, none of which can lawfully be done on interstate traffic. Intrastate shippers are to have the benefit of a reduction of \$1.50 per car in the through rate without the consent or concurrence of the Minneapolis Eastern. Their interstate competitors located across the state line, under the law as announced in the foregoing quotation, cannot be given such preferential treatment. This is clearly an interference with interstate commerce, not justified by any contention advanced in the brief and argument of opposing counsel.

Not only is the interstate shipper prejudiced, but the locality outside the boundary of Minnesota is put at a corresponding unfair disadvantage compared with the competing locality inside the state's boundary. Nor does the evil end here, for the Minneapolis Eastern, as an instrumentality of interstate commerce, is required, without its consent and without provision for compensation, to yield gratuitous use of its property in intrastate transportation and is left to recoup its loss by assessing higher

charges against interstate commerce. As an alternative it may content itself with having its property taken without just compensation.

CONCLUSION.

In general it may be said of the brief and argument for defendant in error that it fails to recognize the following conditions fixed by the record made in the case, namely:

First. That the State Commission and state courts reached the conclusion that the evidence did not show the rates involved to be unreasonable or excessive.

Second. That the State Commission and state courts did not find unlawful discrimination because of the circumstance that the line carriers absorb switching charges on the competitive outbound shipments while declining to absorb switching charges on the noncompetitive inbound grain.

Third. That the only element of discrimination found by the State Commission and the state courts is the alleged discrimination resulting from the application of a charge in excess of the line-haul rates for deliveries made on the rails owned and operated by the Minneapolis Eastern when no similar charge in excess of the line-haul rates was made for deliveries on the rails owned and operated by the line-haul carriers.

Fourth. That the alleged discrimination found by the State Commission assumes that the rails owned and operated by the Minneapolis Eastern are the terminals of the Omaha and Milwaukee Roads, and unless this assumption is sound, there is no discrimination. The only support of the order involved in this appeal lies in the assumption by the State Commission that the rails owned

and operated by the Minneapolis Eastern are the terminals of the two lines that own the stock of that railroad.

Fifth. No question of general public policy is involved and the charges made and paid were the same as they would have been had the Omaha and Milwaukee Roads owned no part of the stock of the Minneapolis Eastern.

Sixth. The Commission specially found and recited in its findings of fact required by statute that "the Minneapolis Eastern Railway Company is managed and operated by its board of directors" and "the company owns its own equipment and performs services for all railroads on equal terms."

Respectfully submitted,

J. W. Root

B. W. Synes

Attorneys for Chicago, Milwaukee &
St. Paul Railway Company.

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1916

NO. 712.

**Chicago, Milwaukee & St. Paul Railway Company,
Chicago, St. Paul, Minneapolis & Omaha Rail-
way Company and Minneapolis Eastern Rail-
way Company,**

Plaintiffs in Error,

vs.

**Minneapolis Civic & Commerce Association,
Defendant in Error.**

**IN ERROR TO THE SUPREME COURT OF
MINNESOTA.**

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Defendant's brief fails to answer the contentions of the plaintiffs and ignores many of the material issues. The issues so ignored are, viz.:

(1) Is a part of the property of the Minneapolis Company the property of its stockholding roads?

(2) Is it the duty of those roads to perform, free of charge, a service now rendered by the Minneapolis Company for a compensation admitted to be reasonable?

(3) Do the findings of the Court and Railroad Commission support these conclusions?

To sustain the judgment herein rendered, all of these issues must be decided in the affirmative.

I.

CONTROL OF THE CORPORATION DISTINGUISHED FROM CONTROL OF ITS OPERATIONS.

Defendant ignores the findings that the property involved is owned by the Minneapolis Company and actually operated by it. It assumes that if the stockholding roads have the power to control, or do in fact control the corporate activities of the Minneapolis Company as distinguished from the actual operation of its property, then its property becomes a part of the property of its stockholding roads. On the other hand, plaintiffs contend that there is a marked distinction between the control of one corporation by another through stock ownership and officers in common and the actual control of its operations.

As this court said in *Pullman Car Company vs. Missouri Pacific Company*, 115 U. S. 587, 596.

“The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific. The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a

sense, the stockholders of the corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property."

And as this Court said in *Peterson vs. Chicago, Rock Island and Pacific Railway*, 205 U. S. 364, 391.

"It is true that the Pacific Company practically owns the controlling stock in the Gulf Company and that both companies constitute elements of the Rock Island System. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific Company the power to control the road by the election of the directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; but this power does not make it the company transacting the local business."

In *Senior vs. New York City Ry.*, 97 N. Y. Supp. 645, affirmed in 187 N. Y. 559, the court construed the word "control" as applied to a railroad owning the stock of another, and the following excerpt from the opinion tersely expresses the contention of the plaintiffs in the case at bar, to-wit:

"It seems to me that the operation or control of a road here spoken of necessarily means the control of the operation of the road, and not merely a control of the corporation or individuals who operate it. A person owning a majority of stock in a corporation cannot be said to be in control of the manage-

ment of the property of the corporation. He has a control over the corporation so far as he has the power to elect its directors, but the corporation is itself a person and such corporation actually owns and controls its property. The provision here does not relate to the control of the corporation by its stockholders, but to the control of the operation of a railroad by those charged with that duty, as distinguished from the control of a person who operates the railroad. It would be quite absurd to speak of a person owning a majority of the stock of the corporation as being the owner of the property, or as controlling the use to which the property should be put. He may be said in a sense to control the corporation, but the corporation itself owns its property and controls and manages it."

The Railroad Commission and Court having found that the Minneapolis Company, through its board of directors and managing committee, consisting of two of its members selected by the board, actually operates its property, it becomes immaterial as to who owns its stock or who officers the Company.

II.

THE ORDER MUST STAND OR FALL ON THE FINDINGS OF FACT.

The defendant's brief does not directly controvert the plaintiffs' contention that the findings of fact did not justify the conclusions of law or sustain the order complained of. In its efforts to supplement the findings, defendant invokes the contract of October 28, 1878, and asserts that this contract legally transferred 2.63 miles of the Min-

neapolis Company's tracks to its stockholding roads without in any way affecting its title or possession to the remaining 2.5 miles of track. The findings make no reference to this contract, base no conclusion thereon and contain nothing to warrant the inference that any part of the property of the Minneapolis Company belongs to its stockholders, or that they are in possession thereof or in control of its operations. On the contrary, the findings are that this property belongs to the Minneapolis Company and is actually operated by it; that it imposes by its tariffs all charges for services rendered and has fully responded to all of its obligations as a common carrier by railroad. These findings do not support, but directly contradict the conclusion of law that any part of its property is a part of the terminal property of its stockholding roads.

The defendant does not assert that any of the findings are unsupported by the evidence. It cannot, therefore, resort to the evidence to supplement or contradict the findings as made. It is elementary that the findings are the sole authority for and must in themselves be sufficient to support the judgment. They cannot be supplemented by the evidence and the Appellate Court cannot disregard them and draw its own inferences of fact.

Hodge vs. Ludlum, 45 Minn. 290,
St. Paul & Duluth R. R. vs. Hinckley, 53
Minn. 398.

It also follows that this court has no jurisdiction to review the findings of fact made by a state

court or to make new findings from the evidence in order to sustain the judgment. The defendant cannot, therefore, resort to this contract to establish facts not found by the Railroad Commission, however necessary they may be to sustain the validity of said order.

Plaintiffs contend that for want of a finding that the property involved is owned by the stockholding roads, or that they operate it or control its operations, the order is unlawful and the judgment herein should be reversed. There is no finding that the stockowning roads are in possession of this property or have title thereto, or have control of its operations, some one or more of which was necessary to justify the order taking the property from the possession of the Minneapolis Company, and turning it over to its stockholding roads. Defendant cannot, by reference to the contract, inject into the findings, facts which are not there and which are inconsistent with the facts found. Plaintiffs insist that the validity of the order, so far as the defendant is concerned, must stand or fall upon the findings as made and that all reference to the contract must be disregarded. In this connection attention is directed to their original brief (pages 21, 22 and 23), dealing with conditions existing when the contract was executed, and pointing out that it was executed before the line roads acquired their stock, how each and all of its provisions have been nullified by law or by mutual consent, and how the Omaha Com-

pany was not a party to it and never obligated by its terms.

Emphasis is also laid upon the fact, which is self-evident, that the contract confers no greater power or control on the stockholding roads than does the ownership of all the capital stock. In one particular the contract takes from the stockholding roads their rights as stockholders to control the operations of the Minneapolis Company. This is done in the section of the amended contract giving the Minneapolis Company the right to arbitrate any and all questions arising under the contract, which right it would not have but for the contract. (Folio 318.)

III.

THE MINNEAPOLIS COMPANY WAS NOT ORGANIZED FOR AN UNLAWFUL PURPOSE.

Defendant contends at length that the Minneapolis Company was organized for the illegal purpose of practicing unlawful discrimination and that this Court should disregard its legal entity and its ownership and operation of its property in order to prevent such discrimination. No such issue was raised in the complaint filed before the Railroad Commission (Record, page 182), and neither the Railroad Commission nor the trial court considered such issue, and neither made any finding in recognition thereof. Neither did the Supreme Court dignify it by any reference thereto in its opinion. Such contention, furthermore, begs the very question at issue. There is no discrimi-

nation unless the property of the Minneapolis Company is a part of the terminal property of its stockholding roads. The defendant asks this Court first to assume the existence of that fact for the purpose of establishing discrimination, and then, to find that the property of the Minneapolis Company is the property of its stockholders because there is discrimination. Such a contention is not even ingenious and is in direct conflict with the fourth finding of fact, to-wit:

“The company was organized by the millers of Minneapolis and all of the members of the first board of directors were engaged in the milling business. About four years after its organization the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company became the owners thereof by each acquiring one-half of its capital stock then issued to the amount of \$30,000.” (Folio 69.)

This Court might take judicial notice of the fact that the Omaha Company was not incorporated until after the Minneapolis Company was organized, and was not a party to the contract of October 28, 1879. There was no evidence that it succeeded to or assumed the liabilities of any of the parties to that contract.

Some time after the organization of the Minneapolis Company and after the execution of this contract, the Omaha and St. Paul Companies began acting as its bankers by purchasing one-half of its bonds, thereby enabling it to complete the construction and equipment of its road. These

facts clearly indicate that the Company was not organized to perpetrate a fraud or impose an illegal charge on the public. The Court will take judicial notice of the fact that thirty-five years ago railroads were managed and operated as private corporations, and there were few, if any, laws regulating rates. They were then at liberty to make their own charges and impose their own conditions, and there was no reason why they should create a device permitting them to impose illegal charges. This contention of the defendant is not supported by the evidence, and it will therefore, serve no purpose to discuss the law or analyze the cases cited.

IV.

CHARACTER VALUE AND OBLIGATIONS OF THE MINNEAPOLIS COMPANY AS SHOWN BY THE EVIDENCE.

Defendant's argument is based on the assumption that if the findings are not sufficient to sustain the order, the court should consider the evidence and from it deduce facts sufficient to that end. If this be proper, facts not stated in the briefs should be considered. The property affected by this order is of very exceptional character and differs greatly from ordinary industrial trackage. Located thereon are many of the great flouring mills and grain elevators of the Northwest as well as many other industries. The business of the Company is that of switching cars for these industries to and from the nine railroads operating in Minneapolis, all of which have connection with its tracks. (Folio 217.) It also interchanges

cars between these nine railroads and switches cars from one industry to another located on its tracks. (Folio 196.)

In the cost of its property and the character and volume of its business, it radically differs from any industrial trackage in the Northwest. (Folios 154, 103.) It has constructed and maintains at great cost a steel viaduct 1,400 feet long; and numerous steel bridges. (Folio 102.) It has its own office building, engine house, coal sheds, engines and railroad equipment. (Folio 96.) On June 30, 1914, the book cost of its property was \$412,716 (Folio 237, Exhibit No. 5). Its valuation as made by the state was \$604,865 (Folio 213). Its cost of reproduction was \$1,088,390 (Folios 184, 237, Ex. No. 5), and its bonded indebtedness was \$250,000. For the year 1914 its operating expenses were \$35,827, and its gross revenues were \$72,676 (Folios 184, 237, Ex. 6). 14 per cent of its business was intrastate and 86 per cent was interstate. Of its outbound business for that year 19.91 per cent was delivered to the Omaha Company, and 19.28 per cent was delivered to the St. Paul Company. The remaining 60.8 per cent was delivered to the other seven railroads of Minneapolis. Of its inbound business for that year 67 per cent was received from the Omaha and St. Paul Companies and the remaining 33 per cent from the other railroads (Folios 199, 237, Ex. No. 6-a).

V.

DEFENDANT'S CONSTRUCTION OF THE ORDER IS CONTRARY TO ITS PLAIN LANGUAGE AND MANIFEST INTENT.

Defendant's construction of the order complained of is of special interest. (See Defendant's Brief, pp. 42, 43, 44). This construction is contrary to its language and to all rules of construction. Although the order expressly directs the Minneapolis Company "to cease and desist from charging \$1.50 per car" on inbound shipments received from either the Omaha or St. Paul Companies for delivery to mills or elevators on its tracks, or for delivery to connecting carriers (Folio 248), counsel assert that it has no application to the Minneapolis Company, and that it may continue to impose such charges. Although the order expressly directs the Minneapolis Company "to cease and desist from charging \$1.50 per car, or any other sum" for switching outbound cars from said mills and elevators, or from any connecting carriers to either the Omaha or St. Paul Companies, counsel assert that it does "not forbid a switching charge on the outbound flour," and that the Minneapolis Company may continue to impose such charge. Although the order expressly compels the Omaha and St. Paul Companies to operate a part of the property of the Minneapolis Company, counsel assert that it should not be so construed, and that the Minneapolis Company may continue to operate all of its property. In other words, the language of the order may be disre-

garded in its entirety and should be construed to mean nothing more than that it requires the Omaha and St. Paul Companies to absorb the switching charges imposed on inbound grain by the Minneapolis Company.

On behalf of the Railroad Commission (with or without its authority) counsel disclaim any other or different construction of the order and give promise that its teeth and claws will be clipped if the Omaha and St. Paul Companies will absorb those charges. This is a novel method of sustaining an invalid order and has no precedent. Suffice it to say that the language of the order is plain and unambiguous and does not admit of forced constructions or of amendments in this court by assurances of counsel. In arriving at their construction of the order, counsel have assumed the existence of facts contrary to the evidence. They assume that all switching charges on outbound shipments are absorbed by the Omaha and St. Paul Companies. The court and the Commission are in conflict on this matter, and neither is entirely correct. The undisputed evidence shows that the St. Paul Company absorbs switching charges on all traffic over its entire system whenever the freight charge on the line haul is \$15 or over, (Folios 134, 222, 223), and the Omaha Company absorbs switching charges on all traffic over its system whenever the traffic is competitive, but not otherwise. The language of its absorption tariff is as follows:

"In order that the C. St. P. M. & O. Ry. may equalize terminal facilities of other lines, that is, receive freight from and deliver freight to industries located on other lines at the same through charge as assessed, by other carriers for similar service, the following rules will apply; except where the contrary is specifically provided for herein, or in tariffs lawfully on file with the Interstate Commerce Commission, the C. St. P. M. & O. Ry. will absorb switching charges of other carriers when under tariffs of other carriers handling traffic from point of origin to destination, such traffic is not subject to switching charges." (Folios 225, 237, Ex. No. 9.)

Neither Company absorbs all switching charges on the outbound business of the Minneapolis Company, and it is a mistake to assume that no charges are absorbed on the inbound grain business. The absorption of the charges of the Minneapolis Company are subject to the same rules and conditions as are the switching charges of other carriers and all railroads of necessity have substantially the same rules relating thereto.

Counsel emphasize the fact that the Minneapolis Company issues no billing and makes no charge against the shipper, but omits to state that all charges for terminal service, whether rendered by the terminal company or line company, are so handled. In all cases the line company collects the switching charge and accounts to the company performing that service (Folio 131).

Counsel assert that the freight rates of the Omaha and St. Paul Companies embrace compensation for all terminal service. This is a gratui-

tous statement on their part and is unsupported by any testimony. The freight rates of those companies are fixed by statute, which prescribes transportation charges from *station to station*. They do not embrace any terminal service beyond the station, and the fact that no charge for certain terminal service is now made, does not warrant the assumption that the line rates compensate for the terminal service.

VI.

PARTICULARS IN WHICH THE ORDER IS SPECIALLY ARBITRARY AND UNREASONABLE.

Certain arbitrary and unreasonable features of the order complained of were not emphasized in the original brief and special attention is now directed thereto.

(1) The order applies to only 2.63 miles of the trackage of the Minneapolis Company out of a total trackage of 5.13 miles owned or leased by it. (Folio 242.) It takes from the possession and operation of that Company a part of its property and turns it over to its stockholding roads, leaving the status of the remainder thereof most uncertain. It makes a mess of the questions of possession, maintenance, payment of taxes, bonded indebtedness, collection of rates, etc., and intermingles and confuses these questions in such a way that it will be most difficult to adjust them.

(2) The order permits the Company to charge for switching cars from one industry to another located on its rails, and for services rendered other railroads when neither the Omaha nor St. Paul Companies are involved. Nevertheless, the order, by taking the operation of the property from the Company and imposing that duty on its stockholders, deprives the Company of the right to earn the charges which the order does not disturb. It thereby effectually prevents the Company from earning anything on the property, the operation of which is turned over to its stockholders.

(3) The order abolishes all charges imposed by the Minneapolis Company on cars switched from the Omaha and St. Paul Companies to other railroads, and on all cars switched from other railroads to either the St. Paul or Omaha Companies. Inasmuch as the other railroads absorb the switching charges of the Minneapolis Company, the order takes from the treasury of that Company the revenue derived from this source and places it in the treasury of the other railroads. They did not ask for this bounty and they are the sole beneficiaries thereof. It is difficult to see why the Minneapolis Company should be denied the right to charge for services rendered for and paid by other railroads and which in no way affect the cost of transportation to the shipper.

(4) The order requires the Omaha and St. Paul Companies severally to operate this property, which necessarily means that the Minneapolis

Company cannot operate it. While the charges sought to be abolished are imposed on intrastate business, the order in effect drives the Minneapolis Company out of its interstate business by taking from it the right to operate its property. Inasmuch as 86 per cent of its business is interstate, the order will work disaster to its revenues and create an unjust burden on interstate commerce.

(5) The order gives to the industries located on its property an undue advantage over industries not so located and discriminates against the latter. All industries located on the rails of the St. Paul and Omaha Companies are required to pay part of the cost of constructing their trackage and they have large investments therein. (Folios 139, 147.) Those railroads could not, without unlawful discrimination, construct trackage for the industries located on the rails of the Minneapolis Company, unless they required them to pay the cost of such construction. This order, however, gives them trackage without burdening them with the cost of construction and maintenance, and thereby gives them a decided advantage over industries located on the exclusive tracks of the Omaha and St. Paul Companies.

In view of the foregoing considerations and those stated at length in their original belief, the plaintiffs respectfully reassert that said order is

arbitrary and unreasonable and if enforced, will deny to them and each of them their constitutional guarantees.

WILLIAM H. NORRIS,
EDWARD M. HYZER,
JAMES B. SHEEAN,
Attorneys for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 712.

**CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY
COMPANY, and MINNEAPOLIS EASTERN RAILWAY COM-
PANY,**

Plaintiffs, in Error,

VS.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

Defendant in Error.

NOTICE OF MOTION.

**YOU WILL PLEASE TAKE NOTICE, that on March 6, 1917,
at the opening of court on said date, or as soon thereafter**

as counsel can be heard, the plaintiffs in error in the above entitled cause will present to this honorable court the following motion.

Dated February 12, 1917.

CHICAGO, MILWAUKEE AND ST. PAUL RAIL-
WAY COMPANY,

By F. W. ROOT and O. W. DYNES,
Its Attorneys.

CHICAGO, ST. PAUL, MINNEAPOLIS AND
OMAHA RAILWAY COMPANY,

By J. B. SHEEAN and GEORGE W. PETER-
SON,

Its Attorneys.

MINNEAPOLIS EASTERN RAILWAY COMPANY,

By W. H. NORRIS,

Its Attorney.

TO MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION, and
HONORABLE W. C. LEARY, District Judge of Hennepin
Cunty, Minnesota, and HONORABLE LYNDON A. SMITH,
Attorney General of Minnesota.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 712.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY
COMPANY, and MINNEAPOLIS EASTERN RAILWAY COM-
PANY,

Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

Defendant in Error.

MOTION.

Now come the plaintiffs in error in the above entitled cause and move this honorable court to issue a rule to show cause why the judgment of the District Court of Hennepin county, Minnesota, and the judgment of the Supreme Court of Minnesota have not been in all things superseded by the writ of error herein, which is a supersedeas, and why the order of the District Court of Hennepin county, Minnesota, the Honorable W. C. Leary, presiding Judge, of December 7, 1916, is not null and void and wholly ineffectual, because in violation of the supersedeas, and why the defendant in error should not be restrained from proceeding to have promulgated the rates.

pursuant to the said judgments above referred to, pending the decision of this honorable court on the writ of error, and why a writ of supersedeas should not issue, and for general relief.

This motion is based on the affidavit of George W. Peterson, one of the attorneys in the said cause, and on all the files and proceedings herein.

Dated February 12, 1917.

CHICAGO, MILWAUKEE AND ST. PAUL RAIL-
WAY COMPANY,

By F. W. ROOT and O. W. DYNES,

Its Attorneys.

CHICAGO, ST. PAUL, MINNEAPOLIS AND
OMAHA RAILWAY COMPANY,

By J. B. SHEEAN and GEORGE W. PETER-
SON,

Its Attorneys.

MINNEAPOLIS EASTERN RAILWAY COMPANY,

By W. H. NORRIS,

Its Attorney.

SUPREME COURT OF THE UNITED STATES**OCTOBER TERM, 1916.****No. 712.**

**CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY
COMPANY, and MINNEAPOLIS EASTERN RAILWAY COM-
PANY,**

Plaintiffs in Error,

VS.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

Defendant in Error.

AFFIDAVIT IN SUPPORT OF MOTION.

**STATE OF MINNESOTA,
COUNTY OF RAMSEY. ss.**

**GEORGE W. PETERSON, being first duly sworn deposes
and says:**

(1) That he is one of the attorneys for the Chicago, St. Paul, Minneapolis and Omaha Railway, one of the Railway Companies in the above entitled cause; that he makes this affidavit in behalf of the said Railway Company, and likewise in behalf of the Chicago, Milwaukee and St. Paul Railway Company, and the Minneapolis Eastern Railway Company, the other Railway Companies in said cause.

(2) That said cause involves the validity of certain switching charges imposed by the Minneapolis Eastern Railway Company on intrastate consignments moving over the lines of the Chicago, Milwaukee, and St. Paul, and the Chicago, St. Paul, Minneapolis and Omaha Railway Companies. (Trans. p. 1.)

(3) That after a hearing the Railroad and Warehouse Commission of Minnesota held that the switching charges in question were unlawful, and ordered the Railway Companies to desist from making the said switching charges. (Trans. p. 8.)

(4) That the Railway Companies (plaintiffs in error) appealed from the order of the Railroad and Warehouse Commission and pending the appeal, the District Court of Hennepin county, on February 8, 1915, made the following order:

"The court having heard the arguments of counsel and being now fully advised in the premises, it is hereby ordered that the motion of the appellants herein be granted and that the operation and effect of the order herein appealed from be stayed until the final determination of this appeal or until the further order of the court.

It is further ordered that the appellants shall keep a detailed account, beginning February 1, 1915, showing all charges collected by the appellants, respectively, on intrastate traffic, in excess of the charges that said appellants, or any of them, would or could have collected had said order of said Commission been complied with. Said detailed account shall show the amount of said excess charges, dates of payment, the car number, the consignor and consignee, the party paying the same, and the nature of the traffic upon which said charges accrued. The defendants shall, when and as directed by the court, file with the court a report showing fully the amount of said excess

charges so collected and the parties from whom collected."

That said order has been complied with and the accruing switching charges have been allocated and conserved for the protection of shippers and such status will continue, pending the decision of this court on the writ of error.

(5) That on December 31, 1915, the District Court of Hennepin county, The Honorable W. C. Leary, Presiding Judge, made an order affirming the order of the Railroad and Warehouse Commission, said order for judgment, however, providing that:

"The order staying the order of the said Railroad and Warehouse Commission herein, dated February 8, 1915, be continued in full force and effect until further order made herein."

(Trans. p. 99.)

(6) That on February 8, 1916, judgment was duly entered on the said order for judgment, and the said judgment of the District Court of Hennepin county:

"continued the preliminary order of this court made February 8, 1915, staying the operation of the order of the Commission until further order made herein."

(Trans. p. 102.)

(7) That on March 27, 1916, the Railway Companies duly appealed to the Supreme Court of Minnesota from the judgment of the District Court of Hennepin county (Trans. p. 103) and on July 21st the Supreme Court rendered its decision affirming the judgment of the District Court of Hennepin county (Trans. p. 113) and judgment was duly entered in the Supreme Court affirming the said judgment. (Trans. p. 114.)

(8) That Sec. 4200 General Statutes of Minnesota, 1913, reads as follows:

"4200. Appeals to Supreme Court—Any party to an appeal or other proceeding in district court under the provisions of this chapter may appeal from the final judgment, or from any final order therein, in the same cases and manner as in civil actions. No bond shall be required from the commission, and no such appeal shall stay the operation of such order or judgment unless the district or supreme court shall so direct, and unless the carrier appealing from a judgment or order fixing rates for transportation of persons or property shall give bond in a sum and with sureties approved by a judge of the court ordering the stay, conditioned that the appellant will refund to the person entitled thereto any amount received for such transportation above the amount finally fixed by the court. Any person paying such excessive charges shall have a claim for the excess, whether paid under protest or not, and, unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such carrier, or such carrier and the sureties on such bond. The appeal may be filed in the supreme court before or during any term thereof, and shall be immediately entered on the calendar and heard upon such notice as the court may prescribe."

(9) That on April 6, 1916, the District Court of Hennepin county made the following order under and pursuant to said Section 4200:

"The above entitled matter coming on before the above named court, Frank J. Morley, Esq., appearing for the complainant, and George W. Peterson, Esq., appearing for the defendants, and the defendants having moved for an order staying and superseding the judgment of the Court herein, and this for the purpose of an appeal to the Supreme Court of Minnesota;

Now, Therefore, It Is Hereby Ordered, that the judgment of the Court herein be stayed and superseded until the final determination of the said appeal, or the further order of the Court, provided, however,

that the defendants are required to give a bond in the sum of twenty-five hundred dollars (\$2500.00), conditioned as provided in Section 4200, General Statutes 1913; the said bond to be approved by the Court.

Dated April 6, 1916.

By the Court:

W. C. LEARY,

District Judge."

That the said Railway Companies duly gave the bond provided for in said order and the said Court duly approved the same on April 6, 1916.

(10) That no mandate or remittitur in said cause has ever come down from the Supreme Court of Minnesota to the District Court of Hennepin county, Minnesota.

(11) That on August 23, 1916, the said Railway Companies duly petitioned for a writ of error, an order allowing the writ of error was duly made, a writ of error was duly issued, which was a supersedeas, the Minneapolis Civic and Commerce Association was duly cited to be and appear before the United States Supreme Court, a supersedeas bond in the sum of \$30,000 was duly given and approved, a return was duly made to the United States Supreme Court, and by virtue of the premises the said cause is now pending in this court, and the judgments of the District Court of Hennepin county and of the Supreme Court of Minnesota have been duly stayed and superseded, and the whole thereof, pending the decision and mandate of the Supreme Court of the United States. (Trans. p. 119 et seq.)

(12) That notwithstanding the premises the Minneapolis Civic and Commerce Association on November 11, 1916 brought on a motion in the District Court of Hennepin county, Minnesota, before the Honorable W. C. Leary,

one of the Judges thereof, to set aside the order of said court made under and pursuant to Sec. 4200 G. S. 1913, which said order made by the court under said Sec. 4200 stayed the operation of the judgment of the said District Court of Hennepin county, Minnesota. (Paragraph 9, *supra*.) That the purpose of said motion was to obtain an order in aid of execution of the judgment and in order to promulgate rates pursuant to the said judgment.

(13) That the said Railway Companies appearing specially for such purpose, claimed that the District Court of Hennepin county, Minnesota, had no jurisdiction to set aside its order theretofore made under Section 4200, but notwithstanding the special appearance and the contentions of the Railway Companies, the said Court on December 7, 1916, made an order setting aside its order theretofore made under Section 4200, staying the judgment of said court. That a copy of said order is hereto attached and made a part hereof, marked "Exhibit A."

(14) That by virtue of the premises this affiant alleges the fact to be that the District Court of Hennepin county, Minnesota, was without jurisdiction to make the said order dated and filed December 7, 1916, and that said order impinges the rights of the Railway Companies (plaintiffs in error) under the writ of error which is a supersedeas. That the Railway Companies on December 19, 1916, sued out in the Supreme Court of Minnesota, a writ of prohibition, claiming that the District Court of Hennepin county, Minnesota, had no jurisdiction to make the said order of December 7th, and that said order was in violation of the writ of error and supersedeas. That the decision of the Supreme Court of Minnesota on the writ of prohibition handed down on February 2, 1917, is hereto attached and

hereby referred to, and made a part hereof, and marked "Exhibit B."

(15) That the decision of the Supreme Court of Minnesota referred to in the preceding paragraph, does not recognize, but on the other hand impinges the rights of the Railway Companies under the supersedeas.

(16) That unless restrained it is the purpose and intention of the Minneapolis Civic and Commerce Association to forthwith execute the judgment and have the Railroad and Warehouse Commission of Minnesota promulgate rates pursuant to the judgment of the District Court of Hennepin county, and the judgment of the Supreme Court of Minnesota to the manifest prejudice of the said Railway Companies, and in violation of the supersedeas.

(17) That it is the purpose and intention likewise of the Attorney General of Minnesota, who by virtue of his office is attorney for the Railroad and Warehouse Commission of Minnesota and who has appeared in these proceedings (Trans. p. 95) to have the said commission promulgate rates pursuant to the judgment of the District Court of Hennepin county, and the judgment of the Supreme Court of Minnesota, unless this court grants relief in the premises.

(18) That unless the District Court of Hennepin county, Minnesota, the Honorable W. C. Leary, Presiding Judge, is restrained, and unless the order of said court of December 7th, 1916, is declared null and void and ineffectual because in violation of the supersedeas, then as this affiant is informed and believes, it is the order of said court that the Minneapolis Civic and Commerce Associa-

tion proceed forthwith to have the Railroad and Warehouse Commission promulgate rates pursuant to the judgment of the said court and the judgment of the Supreme Court of Minnesota, all to the manifest prejudice of the said Railway Companies.

(19) That the said Railway Companies are without adequate remedy save by the interposition of this Court, and pray that this Honorable Court issue a rule directed to the District Court of Hennepin county, Minnesota, the Hon. W. C. Leary, presiding, and to the Minneapolis Civic and Commerce Association, to show cause why the judgment of the District Court of Hennepin county, Minnesota, and the judgment of the Supreme Court of Minnesota have not been in all things superseded by the writ of error herein, which is a supersedeas, and why the order of the District Court of Hennepin county, Minnesota, the Honorable W. C. Leary, presiding judge, of December 7, 1916, is not null and void and wholly ineffectual, because in violation of the supersedeas, and why the defendant in error should not be restrained from proceeding to have promulgated the rates, pursuant to the said judgments above referred to, pending the decision of this honorable court on the writ of error, and why a writ of supersedeas should not issue, and for general relief.

GEORGE W. PETERSON.

Subscribed and sworn to before me this 8th day of February, 1917.

(Seal)

P. A. ROCKWELL,

Notary Public,

Ramsey County, Minnesota.

My commission expires June 20, 1923.

EXHIBIT "A."

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin, Fourth Judicial District.

No. 140303.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

VS.

MINNEAPOLIS EASTERN RAILWAY COMPANY, CHICAGO, ST.
PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COM-
PANY,

Defendants.

The above entitled matter being regularly upon the special term calendar of the above named Court came on before the undersigned, one of the Judges of said Court, upon the 11th day of November, 1916, on a motion made on behalf of the complainant and interveners for an order of this Court vacating previous orders heretofore made by this Court staying an order of the Railroad & Warehouse Commission.

Lyndon A. Smith, Attorney General of said State, the attorney for the interveners, and Frank J. Morley, Esq., attorney for the complainant, appeared in support of said motion; Messrs. W. H. Norris, attorney for the Minneapolis Eastern Railway Company; F. W. Root and O. W. Dynes, attorneys for the Chicago, Milwaukee & St. Paul

Railway Company, and J. B. Sheean and G. W. Peterson, attorneys for the Chicago, St. Paul, Minneapolis & Omaha Railway Company appeared specially and objected to the jurisdiction of the Court to hear and determine said motion.

The Court having duly considered said motion together with the objection urged by the defendant companies, having listened to the argument of counsel and being fully advised in the premises does hereby grant said motion and does hereby vacate the orders heretofore made by this Court staying the order of the Railroad & Warehouse Commission herein.

Dated this 7th day of December, 1916.

W. C. LEARY,

Judge.

(A stay of ten days is granted.)

MEMORANDUM.

It seems to me that the order of this Court staying the judgment herein is simply collateral to the judgment and had nothing to do with the merits of the action. The merits are, as matters now stand, undetermined finally and will so stand until the appeal is passed upon by the United States Supreme Court. The order granting the stay while had in the proceedings in no way depended upon the findings of fact or judgment directed in the lower court as a matter of right. A judgment directed either way in the lower Court would not, as a matter of right, call for a stay or a refusal of a stay and the appeal herein in no way calls in question the order granting the stay. Neither party appeals from that and it still is within the

jurisdiction of the Court making it. While the stay is mentioned and sought to be provided for in the original order directing the judgment, yet it was not properly there and was not as a matter of necessity there. Insofar as that particular order had to do it was not a compliance with the requirement of statute and really of no effect and counsel so regarded it because they asked for a further stay in connection with the giving of a bond which was a compliance with the statute and really is the only effective order granting a stay. On the merits aside from the question of jurisdiction, I am of the opinion that I have gone as far as I should in staying the execution of this order of the Railroad & Warehouse Commission.

Generally speaking and assuming the court had no doubt as to the correctness of its findings, a stay should not have been granted. But I was of the opinion that the State Supreme Court might reverse the action of the lower Court and if it did, I wanted no damage worked to the defendants. I wanted to protect them against any possible mistake on my part, but did not think at the time and do not now think that I am called upon to stay this matter after the Supreme Court of the State has affirmed the lower Court.

If a stay after the Supreme Court of the State had passed upon the matter was sought by either party, it would seem to me that such application should be made to that court and it would be for that court and not the lower court to pass on the advisability of granting such stay or resort might be had to the court appealed to and a showing made there and such court could then exercise its discretion in the matter. When I exercised my discretion and ordered the stay herein of course the Supreme Court

had not affirmed the lower Court and I had in mind when the stay was granted that if affirmance followed, my full duty to the defendants had been performed and it was then for the Supreme Court to act. The statute provides that it may stay such order or judgment. (Sec. 4200, Laws of 1913.)

It appearing that the jurisdiction of this court to make this order is questioned by the railway companies, it is therefore Ordered, that this order is suspended during the period of the stay of this order which the court has granted or of any subsequent stay which may be granted, in order that, if so advised, the railway companies may apply for a writ of prohibition.

Let this memorandum be made a part of the foregoing order.

W. C. LEARY.

Dated this 7th day of December, 1916.

The stay in the above entitled proceeding is hereby extended until and including December 20, 1916, the defendants reserving the right to object to the jurisdiction of the Court in the premises.

Dated December 16, 1916.

By the Court:

CHAS. S. JELLEY,
Judge.

EXHIBIT "B."

2/2/17

310-20266

WRIT OF PROHIBITION.

STATE EX REL, C. ST. P. M. & O. RY. CO., ET AL,
Petitioners,

VS.

DISTRICT COURT OF HENNEPIN COUNTY, ET AL,
Respondents.

PER CURIAM.

Prohibition directed to the district court of Hennepin county.

On March 13, 1916, the district court of Hennepin county on appeal by the relators from an order of the railroad and warehouse commission entered judgment affirming the order. This judgment determined that certain charges exacted by the relators were unlawful. The relators appealed to this court. The papers on appeal were filed on March 27, 1916. There was no appeal bond on this appeal. It was waived. On April 6, 1916, the court made an order staying the judgment until the determination of the appeal, or the further order of the court, upon condition that the relators give a bond in the sum of \$2500 conditioned as required by G. S. 1913, § 4200. This statute provides in effect that an appeal shall not stay the operation of the judgment in such a proceeding as that here involved

unless the district court or supreme court so directs, and unless the carriers appealing give a bond conditioned that they will refund to the persons entitled thereto any amounts received above the amounts finally fixed by the court as the proper amounts. On July 21, 1916, the judgment of the district court was affirmed by this court. On August 23, 1916, a writ of error to review the judgment was allowed. A supersedeas bond in the sum of \$30,000 was approved and filed on August 25, 1916. On December 7, 1916, the district court, upon motion, vacated the stay of April 6, 1916. It has suspended the operation of this order but unless prohibited will put it into effect.

The only question is whether the court had jurisdiction on December 7, 1916, to vacate the stay of April 6, 1916. The effect of an appeal from the district court to the supreme court in a proceeding like this is not to stay the judgment. An appeal bond does not have that effect. There is no stay unless one is ordered by the court and it can be ordered only upon the giving of such a bond as is required by G. S. 1913, § 4200. The district court at any time after the appeal and when it was pending in this court could have vacated the stay. We are unable to see how the writ of error and supersedeas affected the power or jurisdiction of the district court. The matter of a stay was a matter collateral to the judgment. The district court had jurisdiction to vacate it. This disposes of the case.

Writ quashed.

MAR 27 1917

JAMES D. WAH
St

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 212

283

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHI-
CAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
MINNEAPOLIS EASTERN RAILWAY COMPANY,

Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

Brief for Defendant in Error.

LYNDON A. SMITH,

Late Attorney General of Minnesota,

CLIFFORD L. HILTON,

Attorney General,

AND

FRANK J. MORLEY,

Attorneys for Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 712.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, MINNEAPOLIS EASTERN RAILWAY COMPANY,

Plaintiffs in Error;

vs.

MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

The Minneapolis Eastern Railway Company is a small switching road, whose entire capital stock is owned by the Milwaukee and Omaha Companies, each line company owning one-half thereof. Its tracks are situated in the flour milling district of Minneapolis and consist of 1.07 miles of so-called main line track and 1.56 miles of yard track and sidings. It also claims to own 2.10 miles of track on the opposite bank of the Mississippi River, which, however, it does not operate (Record, p. 96). Either the Milwaukee or the Omaha Company will deliver a car of grain upon which it receives the line haul to any mill or elevator located on its own rails in Minneapolis for the line haul

rate without the addition of any switching charge; it being a conceded fact that the rate for the line haul is intended to include and does include a charge for switching to any industry on the track of the road performing the line haul. If, however, the car of grain is delivered to a mill or elevator on the tracks of the Minneapolis Eastern Railway Company, the entire capital stock of which, as stated, is owned by the Milwaukee and Omaha Railroads, there is a charge made in addition to the line haul rate of \$1.50 for switching the car to the industry. The Railroad and Warehouse Commission in its order held that the tracks of the Minneapolis Eastern Railway Company were in fact a part of the terminals of the Milwaukee and Omaha Companies, and that it was the duty of the Milwaukee and Omaha Companies to cause the cars of grain on which they received the line haul to be delivered to industries on the Minneapolis Eastern Railway without additional charge above the line haul rate; and further, that the imposition of this additional charge made for the delivery to the mills and elevators on the Minneapolis Eastern Railway constituted an unlawful discrimination against such mills and elevators in violation of Section 4332 of the General Statutes of Minnesota, for 1913. And, as stated by counsel, it ordered the railroads to cease and desist from the imposition of this additional switching charge. The order thus made by the Commission was absolute in form and did not give to the line railroads the right to remove the discrimination by making an additional charge for switching to industries on their own rails. From this order, the railroad companies each appealed to the District Court of Hennepin county, by which court the order was affirmed. Judgment was entered accordingly, and the railroad companies appealed to the State Supreme Court, which affirmed the judgment of the District Court; and the railroad companies thereupon sued out this writ of error.

ARGUMENT.

I.

Under the statutes of Minnesota the findings of fact of the Railroad Commission are prima facie evidence of the matters therein stated and the order made by it is prima facie reasonable.

Before answering the various contentions of the respective counsel for the carriers, we desire to call to the attention of the Court the provisions of Section 4192 of the General Statutes of Minnesota, for 1913, regulating appeals from an order of the Railroad Commission. By this section it is expressly provided that the findings of fact made by the Commission "shall be *prima facie* evidence of the matters therein stated, and the order shall be *prima facie* reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant."

The findings of the Commission are contained on pages 129 to 134 of the Record. Among other things, the Commission found that the service performed by the Milwaukee and Omaha Companies in making deliveries of carload freight to industries on their own rails in Minneapolis was substantially the same as that performed in making like deliveries to industries on the rails of the Minneapolis Eastern Railway (Record, p. 131). This finding of the Commission of itself is *prima facie* evidence that the services performed are substantially similar, and the burden of proof rests upon the carriers to overthrow it. It was contended by counsel in the District Court and in the State Supreme Court that a greater service was rendered in the making of deliveries upon the Eastern Railway, but they have abandoned this contention in their briefs here. Consequently, it may be taken as conceded in this

court that the service performed is substantially the same. And for that matter, the witnesses in the District Court made no real effort to sustain the switching charge by reason of any additional service performed in making the deliveries. On the contrary, Mr. Trenholm, one of the members of the Managing Committee of the switching road and likewise General Superintendent of the Omaha, frankly admitted that if the Minneapolis Eastern rails were a part of the Omaha to-day, the latter road would make deliveries to industries thereon as a matter of course without the imposition of an additional charge (Record, p. 50).

The Commission further found that the tracks of the Minneapolis Eastern Railway constitute an important, necessary, and convenient terminal facility of each of the two line companies (Record, p. 132). This finding is also *prima facie* evidence of the fact therein recited. It requires no evidence on our part to support it. The burden is upon the carriers to overthrow it.

The Commission also found that the two line companies "directly influence, control and operate the Minneapolis Eastern Railway" (Record, p. 132). Under the statute this finding also must stand unless shown by the testimony to be contrary to the actual facts.

II.

The record shows affirmatively that the two line companies actively control and operate the Minneapolis Eastern Railway, and therefore justifies the order made by the Railroad Commission, even though the mere fact of ownership by them of all its capital stock, standing alone, would not justify it.

Counsel in their briefs have rested their case largely upon the proposition that mere ownership by the Milwaukee and

Omaha Railroads of the entire capital stock of the Minneapolis Eastern Railway Company does not so identify the switching road with the two owner lines as to make of it a part of their railroads. In the language of this Court in *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498, "we are not concerned (at this time) to combat this proposition"; for, as Mr. Justice McKenna said in the case cited, "*the record does not present a case of stock ownership merely, or of a holding company which was content to hold.*"

Before considering further the authorities upon this proposition, we prefer to briefly review the testimony before the court in order to point out just what evidence there is in the record in addition to the bare fact that the two line companies own the entire capital stock of the switching road.

a. Participation by line roads in incorporation and construction of Minneapolis Eastern Railway.

While it is true, as stated by counsel for the line companies in their briefs, that the incorporators of the Minneapolis Eastern Railway were all millers of Minneapolis, it is also true (although counsel omit to record the fact) that these millers were mere nominal incorporators. Representatives of both the Milwaukee and Omaha Railroads were present at the meetings preliminary to incorporation (Record, pp 78, 79). It was desired, as one of the incorporators testified (Record, p. 78) "to procure a charter under the laws of Minnesota, of course, and they wanted the millers to assist in organizing the road." The witness was the original secretary of the Minneapolis Eastern Railway Company and continued as secretary during 1878 and 1879. The Company had been incorporated in June, 1878. He had one share of stock standing in his name for which, however, he paid nothing and never put any money into the Company at all. His connection with the Company was

purely formal (Record, pp. 78, 79). Within a year or two the stock of the company was issued direct to the Milwaukee and Omaha Railroads (Record, p. 79).

There was also introduced in evidence the minutes of a meeting of the Board of Directors of the Minneapolis Eastern held October 25 and 26, 1878 (Record, pp. 137-141), at which the first issue of stock was authorized. At this meeting the president and secretary were authorized to enter into a proposed contract with the Milwaukee and Omaha Railroads, whereby three hundred shares of stock were to be issued by the Minneapolis Eastern, one hundred and forty-five shares thereof to C. H. Pettit, *as Trustee for the Minneapolis Eastern Railway Company*, five shares to the Directors of the Company residing in Minneapolis, seventy-five shares to the Milwaukee, or such persons as it might designate, and seventy-five shares to the Omaha, or such persons as it might designate (Record, p. 139).

There were thus issued to the Milwaukee and Omaha Railroads one hundred and fifty shares of stock, five additional shares to the directors residing in Minneapolis, and one hundred and forty-five shares to Mr. Pettit, *as Trustee for the Minneapolis Eastern Railway*.

Counsel in their briefs say that under this arrangement the Milwaukee and Omaha did not even acquire stock control of the Minneapolis Eastern, and that they did not acquire such control until at least four years after the incorporation of the company. But it is apparent that in so stating they do not consider the effect of the issue of the one hundred and forty-five shares of stock to Mr. Pettit, *as Trustee for the Minneapolis Eastern Railroad* itself. The stock so issued and held by Mr. Pettit, *as Trustee for the Minneapolis Eastern Railway*, would, of course, be treasury stock, which he would have no right to vote (*Thompson on Corporations* Vol. IV, Sec. 3436; Vol. I, Sec. 869). The only outstanding stock which was entitled to vote at the meetings of the company was the one

hundred and fifty shares issued to the Milwaukee and Omaha, and the five shares issued to the directors residing in Minneapolis. If the treasury stock was actually permitted to vote at any meeting of the company, it is apparent at once that it was merely because the Milwaukee and Omaha dominated the situation anyway, and therefore had no reason for questioning such practice. But the stock issued to Mr. Pettit was mere treasury stock held by him as Trustee for the Minneapolis Eastern itself; and even if he were permitted to vote the stock he would of course have represented the stockholders of the Minneapolis Eastern in so doing, who were respectively the Milwaukee and the Omaha Railroads and the five local directors.

The probabilities are that the one hundred and forty-five shares of stock were held in the name of Mr. Pettit, as Trustee, until the Milwaukee and Omaha had supplied the necessary funds to build the railroad. At any rate, within four years, as the Commission found, the entire capital stock of \$30,000 became the property of the Milwaukee and the Omaha roads; and the report of the Minneapolis Eastern Railway Co. filed with the Railroad Commission in 1887, while the matters were fresh in the minds of the officials making the report, stated that the original issue of its *entire capital stock*, amounting to \$30,000 was made direct to the Milwaukee and Omaha Railroads, and that the Minneapolis Eastern Railway Co. received \$30,000 therefor (Record, p. 88).

The Minneapolis Eastern did not actually commence operations until 1879 or 1880 (Record, ff. 47, 80), and the funds with which to build it were furnished by the Milwaukee and Omaha Railways, or derived from bond issues guaranteed by those roads (Record, p. 142, and particularly f. 317); they participated in the proceedings to incorporate the road in the first instance; and have at all times since the first stock in the company was issued, and ever since, had control of that railroad through stock ownership.

b. *Control by Contract.*

We have already referred to the contract which the Minneapolis Eastern entered into with the Milwaukee and Omaha roads in 1878. It is set forth in full on pages 141 to 144 of the Record.

After providing for the issuance of the one hundred and forty-five shares to Mr. Pettit, as Trustee, five shares to the Minneapolis directors, and seventy-five shares to the Milwaukee and seventy-five shares to the Omaha roads, the contract provides that the one hundred and forty-five shares so issued to Mr. Pettit, as well as the five shares issued to the Minneapolis directors "shall not be transferable, except by the written consent of all said parties hereto, and any transfer thereof without such consent shall be void and of no force and effect."

The next paragraph of the contract provides that the Minneapolis Eastern on or before December 1st shall cause two persons to be named by the Milwaukee and two persons to be named by the Omaha to be elected to the Board of Directors of the Minneapolis Eastern Railway Company.

The sixth paragraph of the contract provides that the Milwaukee and Omaha Railroads shall have equal and the same rights in and to the Minneapolis Eastern Railway in all respects; that they are to pay the same price for switching and handling their respective cars and that no partiality or favor is to be shown or extended to one of said parties over the other, and that the business of each is to be transacted with equal promptness and dispatch.

The same paragraph of the contract also provides that the superintendent or person having charge of the operation thereof, shall be appointed by the consent and mutual agreement of all the parties to the contract.

The seventh paragraph of the contract fixes the charges to be

made for switching and also provides that a rebate of fifty per cent of said charge shall be made to both the Milwaukee and Omaha Railways on their business.

The eighth paragraph of the contract provides that in case any other railroad company having equal facilities of access to the mills of Minneapolis with the Minneapolis Eastern Railway shall promptly and satisfactorily do the switching *for the Milwaukee and Omaha Railways* to said mills over its railroad, then and in that case the Minneapolis Eastern, *with the written consent of the Milwaukee and Omaha*, will do switching for such railroad company over the railway of the Minneapolis Eastern on the same terms that switching *for the Milwaukee and Omaha* is done over such other road.

In other words, in addition to the control over the Minneapolis Eastern Railway Co. which the Milwaukee and Omaha Railroads now have by reason of their ownership of its entire capital stock, this contract reserved to the two railroads the right by contract:

First, to have two persons named by the Milwaukee and two persons named by the Omaha elected to the Board of Directors of the Minneapolis Eastern Railroad.

Second, gave to each of said railroads equal and the same rights in and to the Minneapolis Eastern Railway in all respects.

Third, provided that the superintendent or person having charge of the operation was to be appointed *by the consent and mutual agreement of all the parties, including the Milwaukee and Omaha Railroads*.

Fourth, fixed the charges for switching services to be made by the Minneapolis Eastern, and

Fifth, precluded the Minneapolis Eastern from switching for any other railroad having equal access to the mills of Minneapolis unless such other railroad should promptly and satisfac-

torily do the switching *for the Milwaukee and Omaha* to said mills over its said railroad, in which event the Minneapolis Eastern, *with the written consent of the Milwaukee and Omaha*, was authorized to do switching for such other railroad.

By a supplemental contract (Record, ff. 143-144), bearing date December 20, 1878, it was provided that the foregoing contract should remain in full force in all its terms and provisions *until the first day of May, 1918*. It was therefore in full force and effect at the time the order of the Commission was made and is still in effect.

c. Common Directors.

The record also shows that the board of directors of the Minneapolis Eastern Railway has at all times, with the exception of the first three or four years of the Company's existence, been composed of nine members, four of whom have been officers of the Omaha; and three of the Milwaukee. Another member of the Board, while he is not now an official of the Milwaukee road, formerly was its attorney, and at the present time has desk room in the legal department of the Milwaukee Company (Record, ff. 27, 47-49, 65). The ninth member of the Board was a neutral (Record, pp. 65, 47) who was there, in his own language, "to act as between any conflicting interests that might possibly arise" (Record, p. 66). At the time the last neutral member of the Board was elected, he was approached by members of the Milwaukee and Omaha Railroads and asked to take the position (pp. 61, 63).

Attention should also be called to the fact that the stock standing in the names of the individuals comprising the members of the Board does not belong to them, but belongs to the two line companies (Record, 25, 26). The share of the neutral member of the Board belongs to the Omaha Company (Record, p. 27).

d. *Managing Committee.*

Another peculiarity to be noted is the extremely limited functions of the Board of Directors of the Minneapolis Eastern Railway Company with respect to the operations of the Company. By an amendment to its By-Laws adopted in 1887 (Exhibit "I," Record, pp. 153, 154) provision was first made for the appointment of a Managing Committee to consist of two members who *"shall have the management and control of all operations of the Company, subject to the Board, and shall audit and approve all accounts before payment and shall discharge such other duties as may be imposed upon it by the Board."*

The Commission in its ninth finding of fact (Record, p. 97) had found that the Minneapolis Eastern Railway Company was "managed and operated by its Board of Directors, who are now and for a long period have been officers of the Omaha and Milwaukee Companies, and who receive their entire compensation from said railway companies." The Minneapolis Eastern Railway at the hearing in the District Court, to quote counsel's own language, expressly *excepted "to that part of the finding that the railroad is operated by a board of directors. The railroad, in fact, claims that it is operated by a superintendent and its managing directors"* (Record, p. 13). It is claimed by counsel that this question of who *operates* the Minneapolis Eastern presents the decisive issue in this case. To quote from the brief of the Omaha Company (page 28) :

"The laws regulating railroads do not deal with the owners of the capital stock, or the lessors or mortgagees out of possession. They do not deal with the property of a railroad as distinguished from the corporation, or with leased lines, branch lines or subsidiary lines not actually operated by the owners thereof. On the contrary they deal with the persons actually operating the property."

Taking up this aspect of the case, it is important to at once determine the relation of this Managing Committee, which actually *operates* the Minneapolis Eastern Railway Company, to the Omaha and Milwaukee Companies respectively. To do this, we must turn again to the contract executed between the three companies in 1878 already referred to. Under the terms of that contract, it has been seen that the superintendent or *persons in charge of operation* (now the Managing Committee) were to be appointed by the consent and mutual agreement of all the parties, including the Milwaukee and Omaha Railroads (Record, p. 143). The contract does not merely provide that "the superintendent in charge of operation" shall be appointed with the consent of the Milwaukee and Omaha, as counsel would interpret it (Milwaukee Brief, p. 23). It provides specifically that the superintendent or any one else "having charge of the operation" of the Company shall be so appointed. By the amendment to the by-laws adopted in 1887 the Managing Committee was specifically placed in charge of "all operations of the company." Under the contract therefore the members of this committee can only be appointed by the mutual agreement and consent of all the parties to the contract, including, of course, the Milwaukee and Omaha Railroad Companies. The Board of Directors of the Minneapolis Eastern Railway Company is not at liberty on its own motion to make appointments to this committee, but the Milwaukee and Omaha Companies must be consulted and their consent obtained.

At the meeting at which this amendment to the by-laws was adopted Mr. Winter, superintendent or general manager of the Omaha (Record, p. 47), and Mr. Case, general superintendent of the Milwaukee (Record, p. 48) were appointed to this Committee (Record, p. 154). And it is conceded that ever since that time one member of the Committee has been a Milwaukee official and the other an official of the Omaha (Record, p. 49). At the present time and for many years past the general man-

ager of the Omaha and general superintendent of the Milwaukee have constituted this Committee. Questioned by counsel as to what the Managing Committee had done toward managing and operating the Minneapolis Eastern, Mr. Trenholm, one of the present members of the Committee, said, "Well, we have operated it, controlled it" (Record, p. 45).

The counsel state in their briefs, that the evidence shows conclusively that neither line company nor any of their officers directly or indirectly control or direct the policy or operation of the switching road. The comment of the District Judge is pertinent:

"If the Omaha and the Milwaukee roads had wished actual control of a smaller railroad, how better could they do this than to put in actual control their general manager and general superintendent?" (Record, p. 100).

e. *Minneapolis Eastern officials are paid by line railroads.*

Neither Mr. Foster nor Mr. Trenholm, the two members of the Managing Committee, receive any compensation from the Minneapolis Eastern Railway Company for their services. *Their entire compensation is paid by the Milwaukee and Omaha Roads*, and they serve the Minneapolis Eastern gratuitously (Record, p. 25).

This is likewise true as to its President, Vice President and other officials. They receive all their compensation from either the Milwaukee or Omaha, and no compensation at all from the Minneapolis Eastern (Record, p. 25).

The same is true as to the auditor of the Minneapolis Eastern. The general auditor of the Omaha acts as auditor for the Minneapolis Eastern, but receives his entire compensation from the Omaha Railroad (Record, p. 26).

1. *Other Evidence of Control.*

It also appears that at the Directors' meeting held November 27, 1908 (Exhibit "N", Record, p. 159) there was a committee report relative to the issue of new bonds. This report recited that the Committee "*having conferred with representatives of the Chicago, Milwaukee & St. Paul Railway Co. and of the Chicago, St. Paul, Minneapolis & Omaha Railway Co. recommended the adoption of the resolution following:*" Then follows a resolution providing for the issue of new bonds and a trust mortgage securing the same. Article 9 of the Trust mortgage contains the following: "That if the present trustee, or any successor in this trust hereafter appointed, shall resign or be removed * * * the successor or successors to such trustee may be appointed (not by the then holders of the bonds but) *by the Chicago, St. Paul, Minneapolis & Omaha Railway Co. and the Chicago, Milwaukee & St. Paul Railway Co.,*" etc. (Record, p. 168).

It was also shown that the agent and accountant of the Minneapolis Eastern, Mr. Burdick, was in the employ of the Milwaukee Railroad for 34 years before he was appointed to his present position (Record, p. 70). Mr. Burdick has charge of the filing of the tariffs of the Minneapolis Eastern. In making up the tariffs, he testified that he consulted with Mr. Ober, Assistant Freight Traffic Manager of the Omaha, as he claimed merely with respect to the form of the tariffs (Record, p. 70). Questioned as to whether either Mr. Conley, Assistant General Freight Agent of the Milwaukee, or Mr. Ober had ever offered any suggestions with respect to the rates or rules that he should publish, he testified that he did not remember, but that they might possibly have done so—might possibly have advised him to publish certain rules. With respect to the rules contained in the tariff, he asked them if they should be published, some of

them. They advised him that they should be, and he thereupon did it. That he took these matters up with Mr. Ober of the Omaha and Mr. Conley of the Milwaukee, whichever was the more convenient, when he wanted advice (Record, pp. 71, 72).

It was also shown that the able counsel who now appears for the Minneapolis Eastern Railway has heretofore been the attorney of the defendant, Chicago, Milwaukee & St. Paul Railway, and at the present time, while he is nominally the counsel of the Minneapolis Eastern Railway, has his office in the Legal Department of the Chicago, Milwaukee & St. Paul Railway (Record, pp. 27, 48).

Simply to place in juxtaposition the claim of counsel, that the record here presents a bare case of stock ownership by the Milwaukee and Omaha Railroads, with the foregoing recital of the testimony actually contained in the record, is sufficient to demonstrate the lack of foundation for their claim. The record here, as we view it, shows a much greater control by the line companies over the operations of the terminal company than did the record in the Southern Pacific case above referred to.

In that case, it was merely shown that the Southern Pacific Company owned 99 per cent or more of the capital stock of the terminal company and of the various railroad companies named in the opinion; that the terminal company operated certain wharves at Galveston which furnished the connection between the steamboats of the Southern Pacific system and the railroads belonging to that system, extending westerly from Galveston to San Francisco; that the property on which the wharves were located was conveyed to the predecessor in title of the terminal company for the use of the Southern Pacific sys-

tem; and that the ordinance of the City of Galveston authorizing the erection of such wharves and the legislative act ratifying such ordinance contained a similar provision; and that the Galveston, Harrisburg & San Antonio Railroad, one of the railroads of the Southern Pacific system, was the only railroad having a connection with the tracks of the terminal company and did all the switching to and from the docks of the terminal company; and that the terminal company was a party to various circulars issued by the Southern Pacific Companies known as the "Sunset Route," so termed principally for advertising purposes, one of such circulars showing terminal charges at Galveston.

There was no contract between the Southern Pacific Company (the holding company) and the terminal company, providing that the person in charge of the operations of the terminal company should be appointed by mutual agreement between the holding company and the terminal company, nor any contract precluding the terminal company from furnishing wharfage facilities for carriers not connected with the Southern Pacific system without the consent of the holding company; nor did it appear that the person actually in charge of the operations of the terminal company was the general manager or general superintendent of the holding company. It did appear that E. H. Harriman was president of both the holding company and the terminal company, and that the general manager of one of the railroads, whose stock was owned by the holding company, was also general manager of the terminal company; but otherwise, so far as appears, each company had its own officers and board of directors.

It did appear that the property upon which the wharves were located had been conveyed to the predecessor in title of the terminal company to provide terminal facilities for the Southern Pacific system; and likewise, in the present case, it appears by express contract that the tracks of the Minneapolis Eastern

were constructed and the money furnished by the Milwaukee and Omaha Railroads for their construction, in order to provide access for the Milwaukee and Omaha to the flour mills alongside the Mississippi River; and further that the Minneapolis Eastern was not at liberty to switch cars for any other railroad company also having access to the flour mills at Minneapolis, unless such other railroad should promptly and satisfactorily do the switching for the Milwaukee and Omaha to said mills over its said railroad; in which event, the Minneapolis Eastern, *with the written consent of the Milwaukee and Omaha*, but not otherwise, was authorized to do switching for such other railroad.

If, on the record in the *Southern Pacific case*, the terminal company there constituted part of the Southern Pacific system, certainly on the record here, where, in addition to mere stock ownership, we have control by contract and common directors, and the managing officials of the Milwaukee and Omaha actually managing the Minneapolis Eastern, the latter terminal railroad constitutes a part of the systems of the Milwaukee and Omaha Railroad Companies.

It was contended in the *Southern Pacific case* exactly as in the case at bar that mere stock ownership by the Southern Pacific Company of the terminal company did not (to quote from the brief of counsel in that case) "consolidate these different corporations and make them in legal contemplation one agency;" and the same cases were cited by counsel in that case in support of that proposition as are cited by counsel here. But the Court said that it was not concerned to combat the proposition; that

"The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded

from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it."

We have already pointed out that in the *Southern Pacific* case there was no contract giving to the holding company any authority over the management of the terminal company; nor were there officers or directors in common as in the case here presented for consideration. But these two factors are of vital significance and make, as we believe, in the present case, a much stronger showing than in the case of the Southern Pacific Terminal Company. This seems to us to be clearly established by the subsequent decision of this Court in *United States v. Delaware, Lackawanna & Western Railroad Co.*, 238 U. S. 516.

The case cited concerned the right of a railroad to transport in interstate commerce coal mined by it but sold before transportation to a coal company, the capital stock of which was for the most part owned, not by the railroad company, but by its stockholders. The Court will recall that under the Commodity Clause of the Hepburn Act of 1906, it had been made unlawful for a carrier to transport in interstate commerce a commodity which it owned or in which it had any interest, direct or indirect. In *United States v. Delaware & Hudson Company*, 213 U. S. 414, the Court had this statute under consideration, and (to quote from the opinion of Mr. Justice Lamar in *United States v. Delaware, Lackawanna & Western Railroad Company*, *supra*) had there held that:

"Mere stock ownership by a railroad, or by its stockholders, in a producing company, cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier."

This was held to be the case because, to quote from the Court's own language:

"When the commodity clause was under discussion, at-

tention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. *The amendment, however, was voted down*; and, in the light of that indication of congressional intent, the commodity clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock."

It was because of this manifestation of the legislative intention that mere stock ownership was held to be insufficient. But in the *Delaware, Lackawanna & Western case*, as in the case here presented for consideration, there was, in addition to stock control, a contract between the railroad company and the coal company; and further, there were common officers and directors. Commenting on these facts, the Court said:

"But the decisions construing the statute recognize that one corporation can be an agent for another corporation, and that by means of stock ownership one of such companies may be converted into a mere agent or instrumentality of the other. And this use of one by the other—or this power of one over the other—does not depend upon control by virtue of the fact that stock therein is held by the railroad company or by its shareholders. For dominance of the coal company may be secured by a carrier, not only by an express contract of agency, but by any contract which, in its practical operation, gives to the railroad company a control or an 'interest, direct or indirect,' in the coal sold, at the mouth of the mines.

Assuming, then, that the incorporation and organization of the coal company under the auspices of the railroad company was legal; *assuming* that the election of the railroad officers as the first managers of the coal company was not illegal; *assuming* that, as officers of the railroad, they could contract with themselves as officers of the coal company; *assuming* that at the time of organization it was not unlawful for the railroad company and the coal company not only to have *officers but offices in common*; and finally *assuming* that all these facts together did not, in and of themselves, establish an identity of corporate interest,—still, *these facts, taken together, are most significant. They*

at least prove that the relation between the parties was so friendly that they were not trading at arm's length."

The Court then considers the effect of the contract between the railroad company and the coal company, which, in many respects, is like the contract here under consideration. Among other important features the coal company, under that contract, was not to buy coal from any other person or corporation without the written consent of the railroad company; and in our case, the terminal company was precluded from switching cars for any other railroad company having access to the flour mills without the written consent of the Milwaukee and Omaha.

Furthermore, one important provision found in the contract here was entirely absent from the contract in the *Delaware, Lackawanna & Western case*. That contract gave to the railroad corporation no voice in the selection of the persons in charge of the operations of the coal company. But the contract in this case expressly reserves such right to the Milwaukee and Omaha. That one provision alone in our contract is sufficient, as it seems to us, to support the Commission's finding that the Milwaukee and Omaha railroads directly control and operate the Minneapolis Eastern Railway. Yet, notwithstanding the absence of any such provision in the *Delaware, Lackawanna & Western case*, the Court there held that the railroad company had such an interest in the coal sold by it to the coal company that it was unlawful under the Commodity Clause for it to transport the coal in interstate commerce.

We have noticed in quoting from the Court's opinion in the *Delaware, Lackawanna & Western case*, that the Court at one point "assumed" for the purpose of the argument that the mere fact of stock ownership and common officers and directors would not be sufficient alone to give to the railroad company an interest in the coal sold by it to the coal company within the meaning of the Commodity Clause. Later the Court recurs to this proposition and lays down the rule by which the railroad

company must be guided in the future if it desires to transport the coal in interstate commerce. Commenting on the fact of common officers and directors, the Court says (paragraph 10 of the opinion):

"The railroad company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It cannot retain the title nor can it sell through an agent. It cannot call that agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet, subject to the control of the railroad company. If the railroad sells coal at the mouth of the mines to one buyer or to many, it must not only part with all interest, direct or indirect, in the property, but also with all control over it or over those to whom the coal is sold at the mines. It must leave the buyer as free as any other buyer who pays for what he has bought. *It should not sell to a corporation with officers and offices in common, for the policy of the statute requires that instead of being managed by the same officers, they should studiously and in good faith avoid anything, either in contract or conduct, that remotely savors of joint action, joint interest, or the dominance of one company by the other.*"

Counsel however say that the contract in this case is a dead letter, that the Milwaukee and Omaha Railroads have never attempted to prevent the Eastern from switching cars for other carriers; and except in their guise as stockholders have never attempted to dictate the selection of the managing officers of the Eastern Railway; and that our objections are purely academic. But this claim of counsel that the contract is a dead letter is a gratuitous assumption upon their part, without any foundation in the record.

Furthermore, as the Court pointed out in the *Delaware, Lackawanna & Western case*, the two lines companies did not have to rely on their rights under the contract *so long as they had stock control*. But, suppose for the moment that they had parted with their stock ownership, would not they still have

had the contract upon which they could have relied? And does not this fact show that they had more than a mere stock control over the operations of the terminal company? The comment of the Court in the *Delaware, Lackawanna & Western* case is pertinent. The Court said that the unusual provisions of the contract in that case:

"may as between the parties have been negligible—certainly *so long as the stockholders remained the same* * * * but the Commodity Clause is not concerned with the interest of the parties, but with the interest of the public. * * * It is argued, however, that the contract has not operated to the injury of the parties or of the public. And, in answer to those urged by the government, it is said that some of the objections now insisted on were not pressed in the lower court; that there is no complaint that the railroad charged the coal company exorbitant prices; or that it ever raised the New York prices; or that it has prevented the coal company from buying coal from other operators; or that the railroad monopolized the coal mined on its railway; or that it deprived such mining companies of an open market. From this it is argued that the present objections to the contract are purely academic. *But its validity depends upon its terms.* And if the coal company is practically the agent of the railroad company, then the transportation of the coal by the latter is unlawful."

The Court in the *Delaware, Lackawanna & Western* case held that the railroad company had an interest in the coal transported by it, even after the coal had been sold to the coal company, because, under the contract the coal company was not, to quote the court's own language "a free agent"; because it was not at liberty "to extend its business" to buy when, where, and from whom it pleased and otherwise to act as an independent dealer." Neither was the terminal company here a free agent. It could not even select its managing officials without the consent of its owner lines and was precluded from switching for other companies having equal access to the mills, unless such other companies performed like service for the Milwaukee and Omaha, in which event, *with the written consent of the*

Milwaukee and Omaha, but not otherwise, it could switch for such other companies. Because by the terms of the contract the Minneapolis Eastern Railway Company was not a free agent and was not free to select its own managing officers and to do switching for any and all other companies, including competitors of the Milwaukee and Omaha, on such terms as it saw fit, and without asking or obtaining their consent; it must be considered to be a mere terminal facility of its two owner roads, and the order of the Commission is therefore justified.

III .

Even if no further fact than stock ownership of the Minneapolis Eastern by the Milwaukee and Omaha Railroads was disclosed by the record, the Commission's order would be justified; for in order to prevent any illegal practice, such as discrimination, the Commission could ignore the fiction of a separate corporate entity and deal directly with the Milwaukee and Omaha Railroads, which own the stock of the Minneapolis Eastern and are the parties really concerned.

Both the State Supreme Court (Record, p. 112, f. 272) and the Railroad Commission (Record, p. 133, f. 307) held, and we in our brief have heretofore assumed, that it was necessary for us to show more than a mere stock control of the Minneapolis Eastern Railway by the Milwaukee and Omaha Railroads in order to justify the Commission's order; and we think we have demonstrated that there is much more than a mere stock control. But notwithstanding the contrary holding of the Court below we think and contend that stock control alone in the instant case ought to suffice, if there were nothing more disclosed by the record; for when "any illegal act", such, for instance, as discrimination, is being accomplished under the guise of a .

separate corporate entity, it is universally held that

"the court will disregard the fiction (of a separate corporation) and deal directly with the parties and subject matter as though no corporation had been formed."

Thompson on Corporations, 2nd Ed. Sec. 37; *Id.*, Sec. 10.

Clark & Marshall, Sec. 6 (e).

Cook on Corporations, 6th Ed. Sec. 6.

Discrimination admittedly is an illegal practice.

See Sections 4348 and 4332 of the Revised Laws of Minnesota for 1913. By Section 4356, it is expressly made a criminal offense.

In prosecutions under the Sherman Anti-Trust Law the defense of a separate corporate entity has been time and again interposed by ingenious counsel, but in each case without avail. It was urged by counsel in the *Northern Securities Company case*, 193 U. S. 197.

But it was an illegal practice with which the Court was there called upon to deal; and it disposed of the defense thus presented as follows:

"The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in one ownership. *Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders.*"

To the same effect in *United States v. Union Pacific Ry. Co.*, 226 U. S. 61, the Court said:

"A more effectual form of combination to secure the control of a competing railroad than for one road to acquire

a dominating stock interest in the other could hardly be conceived."

Likewise, in *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, the Court said:

"The fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guaranty the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific, is contemplated by the arrangement."

In each and all of these cases, it was an illegal act that was being perpetrated, and, as usual under such circumstances, the fiction of the separate corporation was ignored.

In *United States v. Terminal Railroad Association of St. Louis*, 224 U. S. 383, this Court was again called upon to consider an alleged violation of the Sherman Anti-Trust Law. In that case, however, it held that:

"In ordinary cases a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use"; the court saying:

"We are not unmindful of the essential difference between terminal systems, properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce."

But in considering the effect of stock control of the terminal company by the owner railroads, the Court said:

"When thus jointly owned and controlled, whether through the medium of a mere holding or operating company, such as the terminal company is, or by other means, the facilities would belong to each relatively to its own

business, and delivery would be made by each company over its own tracks to connecting lines or places of destination in the city. The charge for the haul thus lengthened would then be properly absorbed by the through rate, leaving nothing to be added to that to be charged the shipper or consignee but switching and storage charges proper."

In stating that the only additional charge for the shipper to pay would be "switching charges proper", we understand the Court to have had in mind a situation where the railroads uniformly made a charge for switching in addition to the line haul rates, *to all industries on their own rails*. That such an additional charge would otherwise be illegal is, we think, established by the subsequent decision of this Court in the *Los Angeles Switching case (United States v. Atchison, Topeka & Santa Fe R. R. Co., 234 U. S. 294)*, to which we shall presently refer. But the important fact to be noted at this time is that the Court in the *St. Louis Terminal case* expressly held that the tracks of the terminal company would constitute a part of the lines of the various railroads which jointly owned its stock.

Nor have counsel in their argument cited any case where any court, when called upon to deal with discrimination, rebates, combinations in violation of the Anti-Trust Law, fraud, or any like unlawful practice, has ever permitted the fiction of a separate corporate entity to be successfully interposed as a defense. They cite in their briefs, *Ulmer v. Lime Rock Railroad*, 98 Me. 579, where the railroad sought to condemn a right of way for an industry track to the plant of the Richland Lime Co., which owned all the stock of the railroad company. The only question there presented was whether by that fact it was precluded from the exercise of the power of eminent domain. No illegal practice of any sort was involved.

In *Monongahela Bridge Co. v. Traction Co.*, 196 Penn.

25, also cited by counsel, plaintiff sued to recover a bridge toll due on contract. Defendant denied liability on the ground that since the contract was executed, the city had purchased all the stock of the bridge company, and that it thereby became a free bridge. No illegal practice of any sort was claimed.

In "*In re Watertown Paper Co.*" 169 Fed. 252, the sole question was whether one corporation, whose stockholders were identical with another corporation which had gone into bankruptcy, was entitled to have its claim allowed in the Bankruptcy Court. There was no claim of fraud or illegal practice of any sort.

In *Richmond Construction Co. v. Richmond Railroad*, 68 Fed. 105, the railroad company made a contract with the construction company to build its road. The stockholders in each company were the same. The construction company became financially involved and assigned its contract to a third party, and the sole question was whether such third party was a contractor or a sub-contractor under the Mechanics Lien Law. No fraud or illegal practice was claimed.

In *Pullman Car Co. v. Missouri Pacific Railroad*, 115 U. S. 587, the construction of a contract between the two corporations was involved. This case was cited by counsel in the *Northern Securities Co.'s case*, but was not regarded by this Court in that case as controlling because it was a simple case on contract, and involved no illegal or criminal practice.

In *Peterson v. Chicago, Rock Island & Pacific Railroad*, 205 U. S. 364, also cited by counsel, the sole question presented was whether service of process might be made on the defendant by delivery of the process to an officer of another corporation controlled by it through stock ownership.

In *Stone v. Cleveland Railroad*, 202 N. Y. 352, plaintiff had contracted with the Cincinnati Northern Railroad for the transportation of certain horses and sued the Cleveland Railroad Company for damages, claiming that it controlled and operated

the other road.

Interstate Commerce Commission v. Stickney, 215 U. S. 98, also relied upon by counsel, is clearly distinguishable as we shall undertake to demonstrate later in our brief.

In the State Courts counsel relied also upon the decision of this Court in the so-called "*Tap Line*" case, (234 U. S. 1). Like the case at bar, that case involved an alleged discriminatory practice upon the part of the railroad companies, whereby it was claimed that unfair advantages were accorded to certain shippers and denied to others. The case seems to us to be very much in point, but just why it was cited by counsel we are at a loss to understand; for, in our judgment, it contradicts in every respect the proposition for which they are contending. As the Court will recall, it concerned certain so-called "tap lines" which connected certain timber lands and lumber mills with various trunk line railroads. The tap lines were separately incorporated companies, but their stockholders were likewise stockholders in the timber and lumber companies, which they principally served. They participated with the trunk lines in through rates and received divisions out of such through rates. The Interstate Commerce Commission found that they were not common carriers, but mere plant facilities, and therefore that they were not entitled to *any allowance or division at all* out of the through rates, and ordered the trunk lines to cease and desist from according such allowances or divisions to the tap lines. This order was set aside by this Court, the Court holding that the tap lines in question were common carriers, and that therefore the order of the Commission in so far as it forbade the trunk lines from according to the tap lines *any allowances or divisions at all* should be set aside.

But after holding that the tap lines were common carriers

and reversing the Commission on that proposition, the Court went further and defined exactly what authority the Interstate Commerce Commission would have to reach discriminatory allowances or divisions made to the owner industries through the guise of their separately incorporated tap lines. The Court said:

"It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers, which have resulted in unfair advantages to the owners of some tap lines and in discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to participate in joint rates with other common carriers, that determination falls far short of deciding—indeed, does not at all decide—that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices, resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty, of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear."

Let us assume a case based on the language just quoted from this opinion. Let us suppose that all the stock in a certain tap line was owned by a particular lumber company, but that the tap line was separately operated in every respect; that it had an entirely separate and distinct Board of Directors and separate and distinct officers; that it was performing services which fairly justified a division or allowance out of the through rate of one cent per hundred pounds; but that the trunk line was actually making an allowance to it of five cents per hundred pounds. In other words, the service performed by the tap line was worth one cent but it actually received five cents therefor, the extra four cents amounting, in effect, to a rebate; and that

the four cent rebate which was being received by the tap line in the form of an allowance was being paid over semi-annually to the owner industry in the guise of dividends. Would counsel contend that merely because there was a separate and distinct corporation separately managed and operated, the Interstate Commerce Commission would not have the power to stop that rebate? Would not the tap line in such a case be so far identified with the industry owning its stock that the Commission and Court could say that the extra division or allowance was, in effect, being paid to the industry? Yet, if counsels' contention be correct, the fact that the tap line was separately operated and there was nothing more than mere stock control would preclude the Commission from dealing with the situation. Its eyes would be blinded by the fiction of a separate corporate entity, and it would not be permitted to see that it was the owner industry and not the tap line, which was actually receiving the rebate. This Court in any event had no hesitancy in stating what would be the power of the Commission in such a case. It said:

"If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the providence of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does."

In other words, as we understand it, the fiction of a separate corporation receiving the allowance could be ignored, and the Commission, in order to prevent the discriminatory practice, could require the allowance to be reduced.

But what is the difference between that case and the case here under consideration? In that case a lesser charge is made to the favored shipper by means of a rebate accorded to him in the form of an allowance to a separately incorporated tap line of which he owns the entire capital stock; and in this a greater charge is imposed upon the non-favored shipper in the form of

an additional allowance which he is required to pay a separately incorporated tap line of which the railroad owns the entire capital stock.

If the fiction of a separate corporation may be ignored in the case of the tap line in the first instance and the Commission may see that it is the industry which owns the stock in the tap line, that is, in effect, getting the additional allowance, why may it not also be ignored in the other case, and why may not the Commission see there also that it is the Milwaukee and Omaha Railroads which own the stock in the Minneapolis Eastern, that are actually receiving a greater compensation for deliveries made, in effect, upon their own tracks and only in form upon the tracks of another and separate corporation?

IV.

It was proper, under the circumstances of this case, for the Commission to make an absolute order forbidding the further imposition of any charge in addition to the line haul rates of the Milwaukee and Omaha Companies.

It is contended that even if the Minneapolis Eastern is a part of the terminals of the Milwaukee and Omaha Companies, the order made is unreasonable and unlawful because *absolute* in form; that is to say, because it absolutely forbids the further imposition of any charge at all in addition to the rate for the line haul, and does not permit the carriers to correct the discrimination by imposing a like charge for switching in addition to the rate for the line haul against the other industries to which deliveries are now made for the line haul rate. The vice in the argument of counsel upon this point lies in their assumption that the charge complained of here is bad "only because it is discriminatory" (Omaha brief, p. 37). The order made by the Railroad Commission is *not based on discrim-*

ination alone. It is based also on the fact that it is the absolute duty of the Omaha and Milwaukee Companies for their line haul rates to deliver carload traffic to the industries on their rails.

It is an admitted fact that the line haul rates of the Milwaukee and Omaha Companies each now include a charge for switching to any industry on their rails (Record, pp. 32, 33; 49, 50). This is true not only at Minneapolis, but at all other points (Record, p. 50). And Mr. Trenholm, one of the members of the managing committee admitted that if the Minneapolis Eastern tracks were a part of the Omaha railroad to-day, the latter road would as a matter of course make deliveries to the industries on its rails without the imposition of an additional charge for the switch (Record, p. 50). The Commission has found in this case that the Minneapolis Eastern tracks are a part of the two line roads. And it being admitted that the rates of each road for the line haul include a charge for switching, cannot the Commission require the defendants to make the deliveries to the Minneapolis Eastern industries for their line haul rates? And would it not be absurd to permit the defendants to correct the situation in the manner suggested by counsel by adding an additional charge for the switch to the other industries on their rails, where the line haul rate to those industries *now includes a charge* for that identical service.

It is true, as urged, that Section 4342 of the General Statutes of Minnesota for 1913, enacts that the schedules filed by the defendants "shall state separately the terminal charges." But this statute would in no respect warrant the defendants in adding a charge for the terminal service performed for the industries admittedly on their own rails; for they would not in so doing be "separately stating" their terminal charges to those industries. They would merely be *adding* an additional charge over and above the sum already allowed for terminal service

in the existing rates. This was what the carriers attempted to do in *Interstate Commerce Commission v. Chicago, Burlington & Quincy Railroad Co.*, 186 U. S. 320. The present Chief Justice, speaking for the Court, said in that case (page 337) :

"Did the carriers, in June, 1894, when they imposed the alleged terminal charge of \$2 separate in their schedules this charge from the through rate? That is, did they divide their charges by setting apart the terminal charge embraced in their previous through rate so as to segregate it from the through rate, thus making one distinct terminal charge and another distinct through rate? The mere inspection of the schedules demonstrates that such division was not made. This is the convincing result, since the schedule did not purport to draw out from the previous through rate the sum of compensation contained therein for terminal services. On the contrary, the entire previous through rate was retained, and a memorandum was placed upon the schedules to the effect that thereafter an additional charge of \$2 for delivery at the stock yards would be exacted. *This was a mere addition to the sum of the terminal charge embraced in the prior through rate.* We think that it cannot be said that to add an additional amount to a former charge was necessary to divide such former charge, without holding that to add one sum to another is necessarily to divide the other."

Furthermore, the order made by the Interstate Commerce Commission in the Los Angeles Switching Case (*Interstate Commerce Commission v. Atchison, Topeka & Santa Fe Railway Company*, 234 U. S. 294), which was sustained by this court, was absolute in form. That order required the carriers absolutely to make the deliveries to the industries on their own rails for their line haul rates without the imposition of any additional charge for switching, and gave to them no option to remove the cause of the complaint by adding a charge for industry switching at other points on their lines. In fact, the two orders in this respect are identical.

It may be urged by counsel that the point that the order in the *Los Angeles Case* was absolute in form was not raised and that the court overlooked that defect in the order in upholding its validity. That is not the case. This feature of the order was not overlooked.

In the first place, it was pointed out by Mr. Commissioner Knapp when the case was before the Commission (18 I. C. C. 329), where he said in his dissenting opinion:

"I apprehend, however, that a finding of undue prejudice to Los Angeles shippers for this reason would warrant no more than an order to cease and desist from the ascertained discrimination, which would leave to defendants the choice of discontinuing the charge at Los Angeles or imposing it at competing points found to be unduly favored."

Furthermore, in the carriers brief in the *Los Angeles Case*, in this court, this feature of the order was expressly pointed out. Thus, it was said (p. 23):

"The order made by the Commission was absolute in its terms, requiring the defendant railway companies to desist from exacting their present charge of \$2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and to abstain from exacting '*any charge whatever*' other than the charge for transportation from points of origin to destination for delivering or receiving carload freight to or from industries located upon such spurs. *It did not require the defendants to remove any alleged discrimination complained of, which the carrier could be at liberty to do by imposing a similar charge upon other shippers or in other localities.*"

Again, at page 79, the same point is urged, and the counsel even quote the dissenting remarks of Mr. Commissioner Knapp above referred to. Thus, they say:

"Had the Commission found any undue preference, etc., it would have been incumbent upon it to point out the localities or shippers unduly favored so as to permit the carrier to obviate the preference in its own way. It could

not make an arbitrary order requiring the carrier to forego imposing any charge altogether, or under any conditions. *In such case the order would have to be made in the alternative so that the carrier would be at liberty to remove the complaint as to any unlawful preference by either foregoing the charge itself at Los Angeles or imposing a similar charge in the other localities found to be unduly preferred. As stated by Mr. Commissioner Knapp in his report."*

(The quotation from Commissioner Knapp's opinion is then incorporated in their brief).

And at page 82 of their brief, counsel in the *Los Angeles Case* say that if the failure to impose a charge for switching at other points results in an unlawful preference:

"The charge could not be condemned altogether, but the order would have to be in the alternative so as to permit the carrier to obviate the unlawful preference in its own way."

And in the supplemental brief filed by the Southern Pacific Railway Co., it is said at page 4:

"Orders predicated upon discrimination proceed upon the assumption that the charge is in itself reasonable, as, indeed, is conceded here; but that the charge in comparison with some other charge or in the absence of a similar charge against some other person or community results in undue discrimination."

In such cases the offense of the carriers lies solely in the discrimination, that is to say in the improper relationship of its charges and the authority of the commission is limited to an order to remove the discrimination, leaving the carrier at its option to bring the two situations into harmony with each other and the law by advancing one charge or reducing the other if the discrimination consist in an improper relationship between charges, or by cancelling one charge or imposing another if the discrimination results from charging for service in one instance and furnishing it free in another."

The Commission may not require the carriers to extend any service without compensation, nor can it look to the charge made for one service for any part or all of the compensation to which the carrier is entitled for another service (*Interstate Commerce Commission v. Stickney*, 215

U. S. 98).

The order of the Commission in this case is not an order to cease and desist from making the charge of \$2.50 per car for industry track delivery so long as no charge is made for team track delivery, or to cease and desist from making this charge at Los Angeles and San Francisco so long as it makes no charge for industry track delivery at other points. The order is to cease and desist from making any charge whatsoever. This order, if valid, cannot be supported as an exercise of the Commission's authority to remove discrimination, but only upon the theory that the carriers have no right as a matter of law to impose any charge whatsoever for this service over and above the charge named in the tariffs for transportation to and from Los Angeles or San Francisco, although those tariffs may, as they did in this instance, specifically establish a separate and additional charge for this service."

Thus, it will be noted that the point here urged by counsel was fully presented to the attention of the court in the *Los Angeles Case*. But the court, in its opinion, upheld the validity of the order. Dismissing from consideration the point that the order, being absolute in form, was based upon a construction of the statute which would forbid a carrier from separately stating its terminal and haulage charges on the same shipment, Mr. Justice Hughes said (page 310):

"No such segregation had been attempted by the carriers here. On the contrary, it was undisputed that the line haul carload rate comprehended receipt and delivery on team tracks or at freight sheds."

So, in this case, it is admitted that the line rates of the Milwaukee and Omaha Companies comprehend the delivery of carload shipments at any industry on the rails of those companies. If the industries on the Minneapolis Eastern are, in fact, on the Milwaukee and Omaha, as they have been found to be by the Railroad Commission, it results that it is the absolute duty of the defendants to deliver the shipments to such industries without additional charge above their rates for the line haul.

V.

The fact that the switching charge of \$1.50 per car is reasonable per se is immaterial.

The Railroad Commission in its findings states that no testimony was presented to show that the charge complained of was inherently unreasonable and accordingly dismissed that ground of complaint. And the carriers therefore assert that to direct them to discontinue the charge takes their property without due process of law.

We assume in discussing this proposition that the Minneapolis Eastern Railway Company is, in fact, a part of the terminals of the Omaha and Milwaukee Companies, as it was found to be by the Railroad Commission, and that the industries situated thereon are, in fact, situated on the tracks of the Omaha and Milwaukee Companies. That proposition being conceded, it seems entirely clear that the Commission had authority to forbid the exaction of the additional switching charge because, by the defendants' own admissions, their line rates already include a charge for switching to all industries on their rails. Suppose the \$1.50 charge exacted for the Minneapolis Eastern switching is reasonable *per se*. Is that any reason why the industries should pay for the switching service twice? They pay for this service when they pay the line rate, and while considered *per se* \$1.50 may be a reasonable charge for the service rendered, it certainly is unreasonable and unlawful to exact it where it has already been paid for in the rate for the line haul.

We think the decision of this court in the *Los Angeles Switching case* already referred to is conclusive on this point. It was conceded in that case that the charge of \$2.50 there under consideration was a reasonable charge, *abstractly considered*; but the Commission held that nevertheless it was il-

legal and unjust and forbade its exaction for the reason that the carriers had already received compensation for the service in the line haul rate.

In the language of the Commission:

"An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays."

Suit was brought in the Commerce Court to set aside this order of the Commission, and in that court the order was, in fact, set aside; the court holding that in inasmuch as the charge of \$2.50 was reasonable *per se*, the Commission had no authority to forbid its exaction. Thus the Commerce Court said:

"To say that the transportation of cars and freight to and from industrial plants located from one-fifth of a mile to seven miles from the main track of the carrier is the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team tracks, is so contrary to the admitted physical facts as to be wholly untenable. It seems clear to us that in the absence of statute the carriers in the present case are not bound to perform this industrial track service; and if they voluntarily perform it under an arrangement with the owner of the industrial plant *we see no reason why they may not charge a reasonable price therefor, and the charge in question is conceded to be reasonable.*"

In other words, the Commerce Court took the same position as the counsel here. Their position is that the Railroad Commission had no authority to forbid the exaction of the \$1.50 charge here under consideration, because that charge in and of itself is conceded to be reasonable. But that is not the question before the Court. The question is whether an additional charge above the line rate should be permitted at all, where admittedly the line rate includes a charge for the identical service rendered by the carrier.

In reversing the decision of the Commerce Court in the *Los Angeles* case this Court said:

"Again it is said that the Commission did not find the switching charge in itself, that is, taken separately, to be unreasonable; *but the inquiry was whether in view of the conditions of the distribution of the carload freight through a large area, there was, in fact, such a similarity of movement as to negative the basis for a separate charge.*"

In other words, the fact that the charge was inherently reasonable was immaterial. That was not the question for consideration. The question was whether there was any basis for a separate charge at all; and the Court upheld the order of the Commission forbidding the exaction of the additional charge.

Counsel, however, rely upon the decision of this Court in an earlier case (*Interstate Commerce Commission v. Stickney*, 215 U. S. 98), which they characterize as "conclusive of the issues in the case at bar." In that case the sole question for determination was the validity of the terminal charge of \$2.00 per car imposed for the delivery of carloads of live stock at the Union Stock Yards in Chicago. It was a charge made in addition to the line rate for transportation (to quote the words of the Court) "*beyond the tracks of said railroads*" to industries on the Union Stock Yards Railway. The pertinent facts were as follows. The stock yards were owned by the Union Stock Yards & Transit Co., which also owned railroad tracks connecting the yards with the various lines of railway entering Chicago. For many years these various railroads operated their own trains over the tracks of the Stock Yards Company, for which no charge at all was exacted by the latter beyond an unloading charge of 25c per car. In 1894, however, the Union Stock Yards & Transit Company commenced the exaction of a charge for the use of its tracks of 80c per car in some instances and of \$1.50 in others. When the railroads became convinced that they

must pay this trackage charge, they, in turn, imposed upon the shipper a charge of \$2.00 per car for the switching to the stock yards (12 I. C. R. 507).

The Interstate Commerce Commission made an order finding that the line rates of the railroad companies were sufficiently high to include a delivery at the stock yards, save for the imposition of the trackage charge exacted by the stock yards company, and that the imposition of the \$2.00 terminal charge was unjust and unreasonable. But in view of the imposition of the trackage charge by the stock yards company, the Commission held that the carriers might reasonably impose an additional charge of \$1.00 per car. It was conceded in that case that the \$2.00 charge attempted to be added by the carriers was a reasonable charge in and of itself for the switching service. The Supreme Court set aside the order of the Interstate Commerce Commission, holding that inasmuch as the charge of \$2.00 per car was reasonable in and of itself, the carriers under the circumstances of that case could not be forbidden to exact it merely because, when added to their rate for the line haul, the combined charge was excessive. The Court in reaching this conclusion said:

"If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards, it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced, the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the Commission to strike at the terminal charge, but the convenience of Commission or court is not the measure of justice."

The Court made this holding because, as it stated:

"The Union Stock Yards Company is an independent corporation."

It is not true that the railroads entering Chicago owned most of the stock of the Stock Yards Company. Originally, they had owned the majority of its stock, but as stated by the Commission (12 I. C. R. 507) :

"As time went on, the different railroad companies which had at first owned a controlling interest in the Union Stock Yards and Transit Company *parted with their stock holdings*, so that, in the year 1894 (when the terminal charge was first imposed), while a majority of the directors of that company were still representatives of various railway interests, *the control of the company had entirely passed from their hands*. In the spring of that year the Stock Yards Company announced its intention of imposing a charge for the use of its tracks leading to the stock yards. *This purpose was earnestly resisted by the railways* without avail, and a charge of 80 cents in some cases and \$1.50 in others per car was exacted for the use of the tracks leading to the stock yards."

So that in every aspect of the case, *the Union Stock Yards Company was an independent company*. Clearly that case is no authority in support of counsel here.

In this case the Commission has found, and in our judgment the facts establish, that the Minneapolis Eastern Railway Company *is not an independent corporation*, but is part and parcel of the two line companies which own its stock, and through their domination of its managing committee and otherwise control its operation.

It is true that the Court in the *Union Stock Yards* case did say in the course of its opinion :

"The fact, if it be a fact, that most or even all of its stock is owned by the several railroad companies entering Chicago does not make its lines or property part of the lines or property of the separate railroad companies."

This remark of the Court is purely *obiter dicta* and not necessary to its decision and is contradicted by the other and later decisions of the Court, among them the *St. Louis Terminal* case (*supra*, this brief p. 25).

Furthermore as we have stated, the record here does not present a case of stock ownership merely, but, on the contrary, *presents a case of complete domination of the terminal company by the line carriers.*

VI.

Counsel misconstrue the order made by the Commission in asserting its invalidity.

Counsel for the Omaha, however, claim that the order if enforced will deprive the Minneapolis Eastern Company of the right to transact the business for which it was organized; deprive it of the possession and use of its property without compensation; prevent its officers from performing their duties and compel it to discharge its employees; and deprive it of all means of paying its bonded and other indebtedness. We think in so stating that the counsel misinterpret the order made by the Commission. They apparently construe it as though in effect it dissolved the Minneapolis Eastern Railway Company, prevented it from operating its road, even as an agency of its two owner lines, and absolutely confiscated its property; but we do not think that the order, given a reasonable construction, even tends to accomplish any such result.

Complaint had been made to the Commission and the Commission had found that in the case of the inbound grain there was a charge made of \$1.50 per car in addition to the rate for the line haul for making deliveries to the industries on the Minneapolis Eastern tracks (Record, p. 131); that by their absorption tariffs the Milwaukee and Omaha Companies *absorbed the switching charge of the Minneapolis Eastern on out-bound traffic*; and that from a practical standpoint shippers of inbound grain were the only persons who had to pay the charges of the Minneapolis Eastern Railway (Record, p. 132). The Commission had also found that in the case of deliveries to

industries on their own rails no additional charge above the line rate of the Milwaukee and Omaha Companies was made (Record, p. 131). The Commission then found that the Minneapolis Eastern Railway was in fact a part of the terminals of the Milwaukee and Omaha Companies, and that it was therefore the duty of the Milwaukee and Omaha Companies to deliver to and receive from the industries on the Minneapolis Eastern carload shipments upon which they performed the line haul, without any charge at all above their line haul rates (Record, p. 132). It therefore ordered that the Omaha, Milwaukee, and Minneapolis Eastern Companies cease and desist from the imposition of the additional charge of \$1.50 per car for handling the inbound shipments of grain to the industries on the Minneapolis Eastern Railway coming from off the Omaha and Milwaukee Railroads; and directed that in the future the Milwaukee and Omaha Companies operate the Minneapolis Eastern tracks as part of their own terminals. *It did not forbid the switching charge on the outbound flour* which, as we have stated, was absorbed by the line companies; and did not forbid the collection of the switching charge from the shipper where a company other than the Milwaukee or Omaha performed the line haul.

Given a reasonable construction, this order does not mean that the line companies must themselves physically operate the switching road. The Minneapolis Eastern can continue to operate it so far as the mere fact of operation is concerned, but it must in the future *do so as an instrumentality or agency* of the line companies, which the Commission has found it to be. It must not be used hereafter as a device for collecting additional switching charges from the shipper on the theory that it is a separate and independent corporation.

The order does not mean the Minneapolis Eastern Railway cannot collect the charge of \$1.50 per car on the inbound grain where the Milwaukee and Omaha Companies absorb the charge.

It can be complied with in either of two ways. The line companies can insert a provision in their tariffs absorbing the charge on the inbound grain, just as now they absorb it on outbound flour. Or they may cause the Minneapolis Eastern Company, which they absolutely control, to cancel the charge of \$1.50 per car now contained in its tariffs, if they see fit to do so. But cancellation of this charge would not preclude the Minneapolis Eastern Railway from billing on the Milwaukee and Omaha for the service rendered by it just as it is now doing.

For it must be remembered that the Minneapolis Eastern Railway does not even today make a charge *against the shipper* for the service performed by it in switching the inbound grain to the industries on its rails (Record, pp. 58, 75). It admittedly bills for this service on the two line companies, which pay the charge, and then add the charge for the switch to their own charge for the line haul and collect the aggregate charge from the shipper or consignee of the car, as the case may be. The Minneapolis Eastern Railway Company can continue this very practice without violating the order made by the Commission in the slightest degree; and the only difference will be that the two line companies, which have already received their pay for the switching service in their rates for the line haul, must absorb the switching charges, and are forbidden to collect them from the shipper a second time. This does not seem to be an unreasonable order for the Commission to make.

And this was the construction put upon its order by the State Supreme Court, which said:

"The practical effect of the order is to require them (the line companies) to extend their 'absorption' so as also to take in the charges of the Eastern for handling shipments of inbound grain" (Record, p. 113).

And on behalf of the Railroad Commission, we hereby disclaim any other or different construction of its order than as above stated.

VII.

The order imposes no burden on Interstate Commerce.

Counsel next claim that the Act to Regulate Commerce preserves the right of the switching road "to require the line haul carriers on interstate shipments to make only such through rates as it is a party to or concurs in" (Milwaukee brief, p. 28), and assert that the order made by the Commission violates this right. But the order does not affect interstate shipments at all; by its express terms it relates solely to intrastate shipments (Record, p. 133). So far as interstate shipments are concerned the carriers may make their rates in whatever manner they see fit. The order of the State Commission does not purport to control them in any way.

Counsel also refer to the section of the Act to Regulate Commerce which requires that the schedules filed by a carrier shall "state separately the terminal charges", etc., and say that under it they have the absolute right to make a separate terminal charge where the services of another carrier must be obtained in order to make the delivery. The act, of course, applies only to the schedules of rates for interstate hauls. It does not require that intrastate rates be filed with the Interstate Commerce Commission and does not purport to regulate the method of making such tariffs. Furthermore, the argument of counsel on this point disregards the fact that the Commission has found that the switching road here under consideration is a part of the terminals of the two line roads. If this finding is sustained, then the line roads in making deliveries to industries on the switching road are making deliveries on their own rails. They do not themselves assert in such a case the right to make a separate terminal charge for the switching service. In fact, their own witnesses, as we have previously stated, admit that in such a case they would not themselves make a separate charge for

the switch; that it would be included in the rate for the line haul.

VIII.

The question whether an undue preference to intrastate shipments will result if the order of the Commission is upheld is a matter primarily for the Interstate Commerce Commission to determine; not for the Courts.

Counsel further assert that the order of the Commission is void because, as they claim, it creates a preference in favor of intrastate traffic as against interstate traffic. In support of this contention they make in their brief (Milwaukee brief, p. 31) certain wholly imaginary rate comparisons from various interstate and intrastate points of origin to Minneapolis. In each instance a point in Minnesota near the boundary line is compared with a point just over the boundary. And they assert that in the case of the intrastate shipment, as a result of the Commission's order, the transportation service is "\$1.50 per car cheaper" than in the case of the shipment from the interstate point, although in counsel's language "the difference in distance is negligible." This, they say, constitutes a discrimination against the interstate shipments; wherefore the order made by the Commission is void. There are two answers to this contention. In the first place there is not a syllable of testimony in the record to support the claim that the aggregate charge on the interstate shipments would be greater than in the case of the intrastate shipments. There is no testimony at all as to the rates actually in effect from any of the points referred to, and for all the Court may know the interstate rate for the line haul may be sufficiently under the intrastate rate, so that the aggregate charge for the interstate shipments would in fact be less than for the intrastate shipments, even if it is assumed that in the case of the interstate shipments the \$1.50

switching charge would be collected. But we pass this defect in the argument of counsel. Similar illustrations were made, and the same contention urged in the *Minnesota Rate Cases*, 230 U. S. 352, where it was claimed by the carriers that the maximum freight rates fixed by this same Commission created an undue preference to intrastate traffic. There likewise innumerable comparisons of rates from interstate and intrastate points of origin near the boundary line were made. The actual rates in that case were before the Court, established by testimony contained in the record and found to be correct by the master; not mere imaginary illustrations like those upon which the counsel here rely. But the Court in upholding the validity of the state rates in that case said that the question whether the carriers by putting into effect those rates were unduly preferring intrastate traffic "would be primarily for the investigation and determination of the Interstate Commerce Commission, and not for the Courts."

Continuing, Mr. Justice Hughes said:

The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it. * * * In the present case there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review."

In the present case it is not claimed that there has been any finding on the part of the Interstate Commerce Commission that there is any discrimination against interstate commerce as a result of the order of the State Commission. That fact distinguishes this case from the cases relied upon by counsel in

their brief. In those cases there had been precedent action by the Interstate Commission, finding expressly that there was a discrimination against interstate shipments, and what the Court held was that the Interstate Commerce Commission had authority to require such discrimination to be removed. It did not hold in any of those cases that the Court would declare to be invalid an order of a State Commission fixing intrastate rates on account of any alleged discrimination against interstate commerce, where there had been no preliminary finding of such discrimination on the part of the Interstate Commerce Commission.

Believing as we do that the order made by the State Commission does not in any respect infringe upon any of the constitutional rights of the plaintiffs in error, we respectfully ask that the judgment of the Supreme Court of Minnesota upholding its validity be in all respects affirmed.

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Late Attorney General of Minnesota,

CLIFFORD L. HILTON,

Attorney General,

AND

FRANK J. MORLEY,

Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 233

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
v.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY
AND MINNEAPOLIS EASTERN RAILWAY COMPANY,

Pls. vs. Defs.

vs.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

Brief for Plaintiff in Error, Chicago, Milwaukee
and St. Paul Railway Company, and Minne-
apolis Eastern Railway Company.

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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 712.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY AND MINNEAPOLIS EASTERN RAILWAY COMPANY,

Plaintiffs in Error,

vs.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

Brief for Plaintiffs in Error, Chicago, Milwaukee and St. Paul Railway Company, and Minneapolis Eastern Railway Company.

May it Please the Court:

The question here presented for decision is:

Is the railroad of the Minneapolis Eastern Railway Company part of the system of railroads, separately owned and operated, of the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, so that (a) traffic originating at stations on the railroad of either of these Companies, in Minnesota, and delivered to mills and elevators on the railroad of the Minne-

apolis Eastern Railway Company, in Minneapolis, or by that Company delivered to connecting carriers in Minneapolis, (b) traffic received by the Minneapolis Eastern Railway Company from connecting carriers, in Minneapolis, for delivery to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, or from mills and elevators located upon the tracks of the Minneapolis Eastern Railway Company for delivery to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, shall, in either case, be charged only the amount of the line haul prescribed in the tariffs of the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, respectively, for the transportation of like traffic between the same stations, on their own rails in Minnesota and mills and elevators on their own rails in Minneapolis and points of connection with the railroads of other carriers in Minneapolis?

Or, to state the same question in another form:

May the shipper compel the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Minneapolis Eastern Railway Company to make no greater charge for the carriage of traffic over their rails, between points on the railroads of the first two named Companies in Minnesota, and points on the railroad of the last named Company in Minneapolis, than is charged by the first two named Companies, respectively, for the carriage of like traffic between the same points in Minnesota and points on their railroads in Minneapolis?

STATEMENT OF THE CASE.

The "Minneapolis Eastern Railway Company, called the "Minneapolis Company," is a railroad corporation organized

and existing under the laws of the state of Minnesota. It was organized by owners of some of the large flouring mills in Minneapolis (Rec., 11). Shortly after the Company was organized, it entered into an agreement with the Chicago, Milwaukee & St. Paul Railway Company, called the "St. Paul Company," and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, called the "Omaha Company," which provided, among other things:

(a) That each, the St. Paul Company and the Omaha Company, should have seventy-five shares of the three hundred shares of the capital stock of the Minneapolis Company, and that each of said Companies should choose two of the nine Directors of the Minneapolis Company;

(b) That the Minneapolis Company should forthwith locate the line of its railroad, procure the right of way therefor, and immediately commence the construction of its railroad and complete the same, with the necessary side tracks, as soon as practicable.

(c) That the Minneapolis Company should issue its bonds in the aggregate amount of \$150,000, with interest at 7% per annum, payable semi-annually, to be secured by a mortgage covering its entire railway, property and franchises.

(d) That the St. Paul Company and Omaha Company should each purchase as many of said bonds as should be necessary to furnish a fund sufficient to pay for the right of way, complete the construction of the railway and equip the same ready for business;

(e) That the St. Paul Company and the Omaha Company should each have equal rights in the railways of the Minneapolis Company; that each should pay the same price for switching and handling their respective cars on said railway; and that the superintendent in charge of the operation of the railway of the Minneapolis Company should be appointed by the

consent and mutual agreement of the three Companies;

(f) That the Minneapolis Company should charge all persons and parties for switching loaded cars in or out of its railway track the same rate, and, in case any other railway company, having equal facilities of access to the mills at Minneapolis with the railway of the Minneapolis Company, shall do the switching for the St. Paul Company and the Omaha Company to said mills over its railroad, then the Minneapolis Company, with the consent of the St. Paul Company, and the Omaha Company, will do the switching for such railroad company over its railways, on the same terms that switching for the St. Paul Company and the Omaha Company is done over such other railroad (Rec., 141, 143).

While the Articles of the Minneapolis Company provided for the construction and operation of a railroad from the City of Minneapolis to the City of St. Paul, with branches to mills and factories, and connections with various railroads (Rec., 11), in these cities, the constructed and operated railways of this Company were confined entirely to the City of Minneapolis, leading from points of connection with the railroads of the St. Paul Company and the Omaha Company, to various large flouring mills in Minneapolis. All the railroads in the City of Minneapolis have either a physical connection with the tracks of the Minneapolis Company, or have trackage rights which give them this connection (Rec., 84). The amount of its trackage is approximately five and one-half miles (Rec., 11).

The property of the Minneapolis Company was valued by the State of Minnesota, in June, 1914, at approximately \$600,000 (Rec., 82). In 1906, that Company had invested in its property, the sum of \$275,130.99. It had outstanding bonds in the aggregate amount of \$150,000, and stock in the aggregate amount of \$30,000—the St. Paul Company and the Omaha Company each holding one-half the bonds and one-half the

stock, less directors' qualifying shares.

June 13, 1906, the capital stock of the Minneapolis Eastern Company was increased \$95,000, and to reimburse the St. Paul Company and the Omaha Company for advances made, the Board of Directors authorized such increased stock to be issued to these Companies in equal parts, \$47,500 par value thereof to each Company (Rec., 6, 156). The first issue of bonds in the aggregate amount of \$150,000, bore interest at 7% per annum. These bonds were retired, in 1909, by a new issue of like amount 4½% mortgage bonds, the St. Paul Company and the Omaha Company each severally guaranteeing the payment of one-half the principal amount of bonds and interest (Rec., 156, 157, 159, 160). The St. Paul Company and the Omaha Company each acquired \$75,000 par value of these bonds. The Minneapolis Company has paid interest on these bonds, and dividends on its capital stock to the holders thereof, out of its earnings.

The Articles of the Minneapolis Company provide that the government of the corporation, and the management of its affairs, shall be vested in the Board of Directors (Rec., 136), and the By-Laws provide that the Board shall appoint its officers and agents, and determine their duties and fix their compensation, and shall also appoint a committee of two members, who shall be called the Managing Committee, which Committee shall have the management and control of all operations of the Company, subject to the Board, and shall audit and approve all accounts (Rec., 150, 151).

Pursuant to these provisions of the By-laws, the Board has uniformly named the Assistant General Superintendent of the St. Paul Company, at Minneapolis, and the General Manager of the Omaha Company, at St. Paul, the Managing Committee. This Managing Committee appoints a superintendent, who is in direct charge and control of the property, and who employs switchmen, enginemen, car repairers, section men and other

employees, all of whom are paid by the Minneapolis Company out of its earnings (Rec., 7, 18, 19). An accounting officer is also employed, who has direct charge of the accounting and traffic business of the Company (Rec., 18).

The Minneapolis Company owns its own equipment, and performs services for all railroads on equal terms (Rec., 7, 18). The Minneapolis Company collects its bills (Rec., 20); makes its purchases (Rec., 20, 35); pays its bills (Rec., 34); makes its charges (Rec., 37); keeps its accounts, and makes its vouchers (Rec., 26); files its tariffs (Rec., 21, 22, 38); makes its reports to the State and Federal Commissions (Rec., 21); pays its taxes State and Federal (Rec., 22), precisely the same as any other railway corporation engaged in operating a railway and transporting property. All taxing, regulating and legislative bodies deal with it as an independent corporation, and have, without exception, treated it as a separately operated railroad.

While, pursuant to the Articles and By-laws of the Minneapolis Company, the stockholders, who are the St. Paul Company and Omaha Company, elect the Directors, and the Directors in turn elect the officers of the Minneapolis Company, such as the President, Vice-President, Secretary and Treasurer, and choose the Managing Committee, composed of two of the Directors, this Managing Committee, as above stated, employ a Superintendent and other subordinate officers, who have direct supervision and control of the railroad and property of that Company, and of its business affairs in respect of its dealings with the public as a transportation agency or facility. The officers of the Company, who are elected by the Board, have uniformly been chosen from the St. Paul Company and the Omaha Company, with the exception of the President and Attorney of the Company, who have no connection with either of those Companies. Mr. Trenholm, one of the Managing Committee since 1903 (Rec., 45), and Mr. Foster, the other

member since 1907 (Rec., 21, 25), both testified positively that neither the St. Paul Company nor the Omaha Company, nor any officer or employe of either these Companies, had at any time, or in any way, attempted to dictate or determine the business policy of the Minneapolis Company, or to direct or control in any way the operation of its railway and property (Rec., 24, 25, 41, 45). Mr. Chamberlain, who has been president of the Company for more than ten years, Mr. Houle, the Superintendent, who has been with the Company since 1881, and Mr. Burdick, the Agent and Accountant, who has been with the Company for more than ten years, each testified to the same effect (Rec., 61, 66, 53, 54, 58, 59, 77). No evidence was introduced or offered contradicting the testimony of these witnesses. Mr. Foster and Mr. Trenholm both testified that the only benefit which the St. Paul Company and the Omaha Company derive from their interest in the Minneapolis Company is the interest on the bonds and the dividends on the stock, which each holds in that Company, and that neither of these Companies has in any way any advantage over any other railroad in Minneapolis that has track connection with the Minneapolis Company (Rec., 23, 24, 46).

As above stated, the Minneapolis Company files its tariffs of charges with the Railroad Commission of Minnesota and with the Interstate Commerce Commission. For many years, these tariffs have prescribed charges for transporting grain in carload lots from the point of connection of its tracks with the tracks of the various railways in Minneapolis to the flouring mills located on its tracks, and also charges for transporting flour in carload lots from said flouring mills to the point of connection of its railway with the tracks of connecting lines in Minneapolis. The charge on all carload freight, excepting grain products, is \$1.50 per car. On grain products, with a minimum weight of thirty thousand pounds, the charge is 10c per ton. The inbound shipments are mostly grain in carload

lots, and the outbound shipments are mostly flour in carload lots. On all inbound shipments of grain in carload lots, originating on the lines of the St. Paul Company or the Omaha Company, and destined to mills on the tracks of the Minneapolis Company, this charge of \$1.50 per car is added to the charge prescribed in the tariffs of the St. Paul Company or the Omaha Company for transporting such grain from the point of origin to Minneapolis. In other words, there is added to the line haul charge of these two Companies on such shipments, the charge of \$1.50, prescribed by the tariffs of the Minneapolis Company. On shipments of grain originating on the lines of the St. Paul Company, or the Omaha Company, destined to points on the rails of either of these Companies, in Minneapolis, no terminal charge is made, the charge being the line haul rate from point of origin to point of destination, in Minneapolis.

In 1912, the defendant in error, Minneapolis Civic and Commerce Association made a complaint to the Railroad & Warehouse Commission of Minnesota against the imposition of the charge of \$1.50 per car on grain originating on the lines of either the St. Paul Company or the Omaha Company, and destined to flouring mills located on the tracks of the Minneapolis Company in Minneapolis, claiming that the tracks of the Minneapolis Company were part of the system of tracks of the St. Paul Company and Omaha Company, in Minneapolis, and for that reason such shipments of grain should be delivered to these mills on the Minneapolis Company's tracks without any other charge than the line haul charge to Minneapolis, such as was made by the St. Paul Company and the Omaha Company on shipments originating on their railroads and destined to points on their railroads in Minneapolis (Rec., 1, 2). It is not claimed that the charge of \$1.50 is unreasonable in amount, but that it operates as an unjust discrimination against the mills and elevators located on the Minneapolis Company's tracks.

The Railroad and Warehouse Commission found:

(a) That mills and elevators are located upon the tracks of the St. Paul Company and Omaha Company, in Minneapolis; that the service performed in handling cars to and from these mills and elevators is substantially the same as that which is performed in the handling of cars to and from the mills and elevators on the Minneapolis Company's tracks; that the charge made by the St. Paul Company and the Omaha Company for delivering a car of grain to a mill or elevator located upon the tracks of the Minneapolis Company is \$1.50, in addition to the line rate from point of origin, while there is no charge made by either of these companies in addition to the line rate for delivering a car to a mill or elevator located upon the tracks of the St. Paul Company, or the Omaha Company.

(b) That the Minneapolis Company is managed and operated by its Board of Directors, who are officers of the St. Paul Company and Omaha Company, and that the general control of the Minneapolis Company is in charge of a Managing Committee, consisting of Mr. Trenholm, General Manager of the Omaha Company, and Mr. Foster, General Superintendent of the St. Paul Company; that a superintendent is employed, and he hires the switchman, enginemen, car repairers and other employes, who are paid by the Minneapolis Company; that the Minneapolis Company owns its own equipment, and performs services for all other railroads on equal terms.

(c) That the Minneapolis Company files its annual reports, and its tariffs with the Interstate Commerce Commission and the Minnesota Railroad & Warehouse Commission, and pays taxes to the State upon its gross earnings.

(d) That the tracks operated by the Minneapolis Company are an important, convenient and necessary terminal facility

for the St. Paul Company and the Omaha Company, and that said Companies directly influence, control and operate the Minneapolis Company.

Based upon these findings, the Commission ordered the St. Paul Company, the Omaha Company and the Minneapolis Company to cease from charging \$1.50 per car for handling inbound shipments over either of the lines of the first two Companies, which are delivered by the Minneapolis Company to the mills or elevators located upon its tracks, and that each said St. Paul Company and Omaha Company operate the tracks of the Minneapolis Company as part of its terminal property within the City of Minneapolis (Rec., 4-8).

An appeal was taken, as provided by the laws of Minnesota, to the District Court of Hennepin County, Minnesota, and that court, after a hearing, found substantially the same facts as found by the Railroad & Warehouse Commission, and affirmed the order of that Commission (Rec., 10-103). An appeal was thereupon taken to the Supreme Court of Minnesota, as provided by the laws of that State, and that court affirmed the judgment of the District Court of Hennepin County (Rec., 103-114).

Plaintiffs in error contend that the Supreme Court of Minnesota erred in its finding and judgment, that the tracks of the Minneapolis Company are part of the terminal properties of the St. Paul Company and the Omaha Company, in the City of Minneapolis, and that they should be operated as part of the system of the terminal tracks of these Companies in that City, and that the Minneapolis Company cease and desist from charging \$1.50 per car for handling inbound shipments over its tracks that are delivered to it by either the St. Paul Company or the Omaha Company, consigned to mills or elevators located upon its tracks, and to review this error, this case is brought here on writ of error, directed to the Supreme Court of Minnesota.

SPECIFICATION OF ERRORS RELIED ON.

I.

The Supreme Court of Minnesota erred in holding that the judgment of the District Court of Hennepin County, Minnesota, affirming the order of the Railroad and Warehouse Commission of the State of Minnesota finding the property of the Minneapolis Company to be the property of the St. Paul Company and the Omaha Company, was not a confiscation of the property of the Minneapolis Company and a deprivation of its property, contrary to Section 1, Article XIV of the amendments to the Constitution of the United States.

II.

That the Supreme Court of Minnesota erred in refusing to hold that the order of the Railroad and Warehouse Commission, if enforced, would deprive plaintiffs in error, and each of them, of their property without compensation, and without due process of law, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

III.

That the Supreme Court of Minnesota erred in refusing to hold that the order of the Railroad and Warehouse Commission was unreasonable and unlawful, in that it compels the St. Paul Company and the Omaha Company to operate the tracks of the Minneapolis Company without compensation, thereby depriving them of their property without compensation, and without due process of law, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

IV.

That the Railroad and Warehouse Commission, having expressly found and entered in its findings of record that no testimony was presented which challenged the reasonableness of the charge of \$1.50 per car, made by the Minneapolis Company, and having dismissed the petition in so far as it complained against the reasonableness of such charge, the order of said Commission, directing the discontinuance of said charge, if enforced, would amount to the taking of the property of the plaintiffs in error, and each of them, without due process of law, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States, and the Supreme Court of the State of Minnesota erred in entering its judgment sustaining, affirming and giving effect to said order of the Commission.

V.

The order of the Railroad and Warehouse Commission deprives the Minneapolis Company of its right, secured by charter granted by the State of Minnesota, to collect reasonable compensation for its transportation services, and has the effect of impairing the obligation of its charter contract, in violation of Section 10, Article I, of the Constitution of the United States, and the Supreme Court of the State of Minnesota erred in affirming, sustaining and giving effect to said order.

VI.

The order of the Railroad and Warehouse Commission deprives the St. Paul Company and the Omaha Company, and each of them, of their contractual rights as stockholders of the Minneapolis Company to derive reasonable and lawful benefits

from the lawful earnings of said last named Company, and has the effect of impairing the obligations of the contract existing between said Companies, in violation of Section 10, Article I, of the Constitution of the United States, and the Supreme Court of the State of Minnesota erred in affirming, sustaining and giving effect to said order.

VII.

The Supreme Court of Minnesota erred in refusing to hold that the order of the Railroad and Warehouse Commission was unreasonable and unlawful, in that it deprived the St. Paul Company and the Omaha Company of the right to remove the alleged discrimination by imposing like charges on traffic delivered to, and received from, mills and elevators located on the tracks of each of said Companies, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States (Rec., 115-117).

BRIEF OF THE ARGUMENT.

The errors assigned may all be reduced to the single proposition that the Supreme Court of Minnesota erred in affirming the judgment of the District Court of Hennepin County, Minnesota, finding, as did the Railroad and Warehouse Commission,

"That the tracks operated by the Minneapolis Eastern Railway Company are an important, convenient and necessary terminal facility for the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, and that said Companies do directly influence, control and operate said Company", (Rec., 97, 98) ;

and thereupon adjudging

(a) "that said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and each of them, be, and the same are hereby, required to operate said main track, yard track and

sidings (of the Minneapolis Eastern Railway Company) as part of the terminal property of each of said railroads within the City of Minneapolis" (Rec., 99);

(b) "that the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company and the Minneapolis Eastern Railway Company, and each of them, cease and desist from charging \$1.50 per car for handling inbound shipments over the lines of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, and each of them, which are delivered by the Minneapolis Eastern Railway Company to mills or elevators located upon the tracks now operated by the same, or delivered by said Company to connecting carriers, and that said Minneapolis Eastern Railway Company cease and desist from charging \$1.50 per car, or any other sum, for delivering carload shipments of freight moving from connecting carriers to the Chicago, St. Paul, Minneapolis & Omaha Railway Company or Chicago, Milwaukee & St. Paul Railway Company, or either of them, or from mills or elevators located upon the tracks now operated by said Minneapolis Eastern Railway Company to said Chicago, St. Paul, Minneapolis & Omaha Railway Company and Chicago, Milwaukee & St. Paul Railway Company, or either of them" (Rec., 98, 99).

It thus appears that should this judgment be executed, it would result in depriving the Minneapolis Eastern Railway Company of the right to make any charge whatever for the terminal service which it renders in handling inbound shipments that are received from either the St. Paul Company or the Omaha Company, or for delivering carload shipments moving from connecting carriers over its tracks to either the St. Paul Company or the Omaha Company, and would impose upon the St. Paul Company and the Omaha Company the entire expense of this service, thereby depriving each of the three Companies of their property without compensation, and without due process of law, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Because the denial of this federal right results from a finding of fact, which plaintiffs in error insist is without support in

the evidence, this court will examine the facts and determine for itself whether there is evidence to sustain the finding.

In *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 566, 567, the court said:

"It is settled that such findings of fact in ordinary cases other than those arising under the 'contract clause' of the Constitution are binding upon this court. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97; *Rankin v. Emigh*, 218 U. S. 27, 32; *Miedreich v. Lauenstein*, 232 U. S. 236, 243. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a federal right has been denied as the result of a finding that is without support in the evidence. *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611; *North Carolina R. R. v. Zachary*, 232 U. S. 248, 259; *Carlson v. Washington*, 234 U. S. 103, 106."

See also,

Frank v. Mangum, 237 U. S. 311, 347.

Barlow v. N. P. Ry. Co., ~~484 U. S. 480~~ 240 U.S. 484.

The facts are few and undisputed. Before the construction of this terminal, the flouring mills and elevators hauled their grain and flour by team to and from the railway tracks in Minneapolis. In 1878, the owners of these mills and elevators conceived the scheme of this terminal, and organized the Minneapolis Company as a railroad corporation under the laws of Minnesota. Mr. J. P. Bassett, one of the mill owners, was the first President, Governor Pillsbury, another mill owner, succeeded Mr. Bassett as President, and Mr. F. A. Chamberlain, a banker of Minneapolis, the present President, succeeded Governor Pillsbury on his death, about twelve years ago (Rec., 60, 61). Shortly after the organization of this Company, an arrangement was made with the St. Paul Company and the Omaha Company for financing its construction, which construction was completed sometime in 1879. The property of this Company has been improved from time to time, so that in 1906, there was invested in its property approximately \$275,000. This investment in part was made out of an issue of \$150,000 of bonds of

the Minneapolis Company, which were taken in equal parts by the St. Paul Company and the Omaha Company, and to reimburse these two Companies for other advances made, the Minneapolis Company issued its capital stock, so that in time these two Companies became the owners of all the bonds and capital stock of the Minneapolis Company. In 1914 its property was valued at approximately \$600,000. As the owners of this stock, these two Companies necessarily have controlled the Minneapolis Company, in so far as the election of its Board of Directors is concerned, and the Board so elected has likewise chosen the principal officers of the Company, such as its President, Secretary and Treasurer, and the Managing Committee provided by the By-laws, consisting of two of the Directors.

The By-laws of the Minneapolis Company, which were adopted June 20, 1882, and amended June 13, 1887 (Rec., 149), provide (Article VIII) that the Board shall appoint a Committee of two members, who shall be called the Managing Committee, who shall hold their office until their successors are elected and qualified. Said Managing Committee shall have the management and control of all operations of the Company, subject to the Board, and shall audit and approve all accounts before payment, and shall discharge such other duties as may be imposed upon it by the Board (Rec., 153, 154). The Board has uniformly appointed as this Managing Committee, a representative of the St. Paul Company, at Minneapolis, and a representative of the Omaha Company, at St. Paul. Since 1903, Mr. Trenholm, of the Omaha Company, and since 1907, Mr. Foster, of the St. Paul Company, have constituted the Managing Committee.

Section 8 of the By-laws provides that this Managing Committee shall have the management and control of all *operations* of the Company, subject to the Board of Directors. The uncontradicted testimony shows that this Managing Committee has operated the property of the Minneapolis Company pre-

cisely the same as any other like separate independent corporation is, or should be, operated. Under the management of this Committee, the Minneapolis Company has made and filed its tariffs of rates and charges for the transportation of property over its lines of railway with the Railroad and Warehouse Commission of Minnesota, and the Interstate Commerce Commission, precisely the same as any other railway company. It keeps its separate accounts, makes and audits its bills and charges, makes its purchases of fuel and supplies, owns its locomotives and equipment, employs and pays its superintendent, accountant and agent, attorney and operating employees, engineers, firemen, switchmen, section men, pays its taxes, state and federal, keeps its books of accounts and makes its reports to public authorities, precisely the same as any other railroad corporation organized under the laws of Minnesota, doing both state and interstate business.

Mr. Trenholm, who has been one of the Managing Committee for more than twelve years last past, and Mr. Foster, the other member for eight years last past, both testified positively that neither the stockholders nor directors, nor any officers of either the St. Paul Company or the Omaha Company had at any time, or in any way, dictated, or attempted to dictate or control in any way the management and operation of the property and affairs of the Minneapolis Company. Mr. Houle, the Superintendent, who has been with the Company since 1881, and Mr. Burdick, the Agent and Accountant, who has been with the Company for more than ten years, each testified to the same effect. The testimony of these witnesses is not only uncontradicted, but is sustained by the manner in which the entire business of the Minneapolis Company has always been conducted. It is also an uncontradicted fact that neither the St. Paul Company nor the Omaha Company has any advantage in any way over any other railroad in Minneapolis that has track connections with the Minneapolis Company, and all the railroads in

Minneapolis have either a physical connection, or have track-age rights, which give them a connection (Rec., 84). In fact, the only benefit which the St. Paul Company and the Omaha Company derive from the Minneapolis Company is the small amount of interest and dividends which they receive as the owners of the bonds and capital stock of that Company, but which they will not receive if the judgment of the Supreme Court of Minnesota is affirmed.

The record completely warrants the statement that, aside from the control which results from the ownership of the capital stock, the affairs and operations of the Minneapolis Company are not controlled by the St. Paul Company and the Omaha Company, or either of them, but are in fact controlled by the Board of Directors and the regular appointed officers and agents of the Minneapolis Company, precisely as the affairs and operations of either the St. Paul Company or the Omaha Company are controlled. The owners of all, or a majority, of the stock of a corporation may be said to control the corporation, but without more, the corporation still actually owns its property and controls its affairs and operations.

Pullman Palace Car v. Missouri Pac. Ry. Co., 115 U. S. 587;

Peterson v. C., R. I. & P. Ry. Co., 205 U. S. 364;

United States v. Del. & Hud. Co., 213 U. S. 366;

Interstate Commerce Commission v. Stickney et al., 215 U. S. 98, 108;

Richmond Construction Co. v. Richmond R. R., 68 Fed. 105;

Ulmer v. Lime Rock R. R., 98 Me. 579;

Monongahela Bridge Co. v. Traction Co., 196 Penn. St. 25;

Stone v. Cleveland R. R., 202 N. Y. 352.

Neither does the fact that the stock of the Minneapolis Company is owned by the St. Paul Company and the Omaha Company unite the railroads of these companies, or their manage-

ment, or make them one system. This is fully sustained by the authorities above cited, and the Railroad and Warehouse Commission, and the District and Supreme Courts of Minnesota, so ruled. Aside from this stock ownership by the St. Paul Company and the Omaha Company, there is no more warrant for the statement that the Minneapolis Company, or its railway and property, are part of the system of either or both of the above Companies than that they are part of the system of other railway companies in Minneapolis, having track connections with the Minneapolis Company, the same as has the St. Paul Company and the Omaha Company; for the Minneapolis Company, in the conduct of its terminal business, sustains the same relation to these other companies as it does to the St. Paul Company and the Omaha Company. The tracks and terminal facilities of the Minneapolis Company are as necessary to the other railway companies in Minneapolis as they are to the St. Paul Company and the Omaha Company, and all these railway companies are treated precisely the same in all respects as are the St. Paul Company and the Omaha Company.

The Railroad and Warehouse Commission of Minnesota, and both the District and Supreme Courts of Minnesota, seem to have relied mainly on the ruling of this court in *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498, to sustain the finding that the Minneapolis Company, and its railway and property, were part of the system of the St. Paul Company and the Omaha Company. A wrong application was made of this case. There, the property, which was held by the Southern Pacific Terminal Company, was conveyed to that Company *on condition* that it be used as a terminal facility for the Southern Pacific Railroad and Steamship Systems. The City of Galveston, in which the property was located, passed an ordinance, which provided that no streets should be open through this property, *on condition* that it should be used as a terminal facility for the Southern Pacific

Railroad and Steamship Systems, which ordinance was subsequently ratified by an act of the Legislature of the State of Texas. It will thus be seen that the property and terminal facilities of the Southern Pacific Terminal Company were *made part of the system* of the Southern Pacific Railroad and Steamship Systems, not only by formal deed of conveyance, but by legislative acts, and those considerations obviously controlled the decision in that case, for the court said:

"In all transactions, it (the Terminal Company and the Southern Pacific Railroad and Steamship System) is treated as single. In the ordinance of the City of Galveston, in the Act of 1899 of the Legislature of the State, and in public circulars, and in the lease of Young, it is the *system* which is dealt with, and not its separate links. And, we have seen, the terminal facilities which the Terminal Company was authorized to maintain were *for the system*, not for the corporate elements considered separately."

In the case at bar, the Minneapolis Company was not organized as a corporation, or its property acquired, or its tracks constructed, for the purpose of being part of the system of either the St. Paul Company or the Omaha Company, or on condition that it should be part of such system. On the contrary, that Company was organized, and its property acquired, and tracks constructed, for the purpose of providing terminal facilities for use by *all* railway companies in Minneapolis, so that they might have access to the flouring mills and grain elevators in that City. The whole record shows that the property and operations of this Company have been devoted solely for carrying out this purpose.

And further, not only did the Southern Pacific Terminal Company receive the property in question *on condition* that terminal facilities should be constructed upon it for the use of the Southern Pacific Railroad & Steamship Systems, but on the *further condition* that if a charge for the use of such facilities upon said property should be made in *addition* to the freight rate, such charges *should be subject* to the regulation of the

Railroad Commission of Texas. Notwithstanding these conditions, the Terminal Company leased a portion of the property together with the terminal facilities constructed thereon, to one Young, a merchant and manufacturer engaged in buying, selling and converting cotton seed cake and meal for his own account. By means of this lease, Young was *released* of the wharfage and storage charges which were made against his competitors, which operated as a saving to him on his shipments of from thirty to forty cents per ton. It was on account of this *discrimination* in favor of Young, that a proceeding was brought before the Interstate Commerce Commission, claiming that the arrangement with Young was in violation of Section Three of the Interstate Commerce Act and this proceeding raised the question whether the property so leased to Young was being used in *violation* of the *conditions* under which the Terminal Company acquired the property. It thus appears that an entirely different situation was presented to the court in that case than is present in the case at bar. Here the property of the Minneapolis Company has been used for the purpose for which it was acquired, namely, to afford terminal facilities for the use of *all* railways in Minneapolis in having access to the flouring mills and elevators in that part of the city, upon equal terms.

The agreement of October 25, 1878. This agreement is found on pages 141 to 144 of the record. Much reliance seems to have been placed upon this agreement by the Supreme Court of Minnesota (Rec., 111, 112). This agreement provides:

(a) That but 300 shares of the 10,000 shares of the capital stock authorized by the Articles of Incorporation of the Minneapolis Company shall be issued; that 145 shares shall be issued to Curtis H. Pettit as trustee for the Minneapolis Company, one share each to the several Directors, and 75 shares to each the St. Paul Company and the Omaha Company.

This provision limiting the issue of stock has not been observed, and instead of being confined to 300 shares, there are now issued and outstanding and in the hands of the Directors of the Minneapolis Company, and the St. Paul Company, and the Omaha Company, 1,250 shares of the capital stock of the Minneapolis Company. All of this stock has been issued in reimbursement of amounts invested in the property of that Company (Rec., 156). It is nowhere claimed that there has been an over-issue of stock, and, in fact, all stock issued has been in full compliance with the laws of Minnesota.

(b) That before December 1, 1878, the Board of Directors of the Minneapolis Company shall cause two persons to be named by each the St. Paul Company and the Omaha Company, to be elected members of the Board.

This method of choosing Directors, if it ever prevailed, was long since abandoned, and the Directors have been and are chosen by a vote of the stockholders at their annual meeting, as provided by the by-laws, which in this respect are substantially the same as the by-laws of railway companies generally.

(c) That the Minneapolis Company shall forthwith locate its line of railway theretofore surveyed, procure the right of way therefor, and commence the construction of its railway tracks as soon as practicable.

It is obvious that this provision did not in any way restrict that Company from fully complying with the obligations of its charter, and was nothing more than an undertaking to meet the obligation imposed upon it thereby.

(d) That the Minneapolis Company shall prepare and execute 150 bonds of \$1,000 each, and to secure the same shall execute a mortgage covering its railway, property and franchises; and that the St. Paul Company and the Omaha Company shall purchase as many of said bonds as may be necessary to furnish sufficient funds to purchase the right of way and complete the construction and equipment of the railway of the Minneapolis Company, each Company taking an equal amount of the bonds.

These provisions are in line with the usual and proper methods of financing the construction of new lines of railway, and do not evidence a control of the Minneapolis Company by the St. Paul Company and the Omaha Company, or either of them.

(e) That the St. Paul Company and the Omaha Company shall have the same rights in and to the railway of the Minneapolis Company; that each shall pay the same price for switching and handling its cars; that the business of each company shall be transacted with equal promptness and dispatch; and that the Superintendent shall be appointed by the mutual consent of the three companies who shall have charge of the operation of the railway; and that the Minneapolis Company shall charge all persons for switching loaded cars the sum of \$1.00 for each loaded car, but in consideration of the St. Paul Company and the Omaha Company having advanced the money necessary to build and complete the railway, a rebate of 50% of such charge shall be made to each of said companies on its business.

The provision in reference to the appointment of a Superintendent shows on its face that the Minneapolis Company has equal voice with the St. Paul Company and the Omaha Company in the appointment. The provision that the Minneapolis Company shall accord to the St. Paul Company and the Omaha Company the same rights in respect to switching and handling cars, and that each should be dealt with impartially, amounts to no more than the obligation which the Minneapolis Company assumed by its charter and which it has strictly observed in respect to all railroads in Minneapolis that have track connections with it. The provision that a charge of \$1.00 shall be made to all parties for switching loaded cars, and that the St. Paul Company and the Omaha Company should receive a rebate of 50% of its charge on their business, if ever observed, was long since abandoned, and the record indisputably shows that no rebates are paid to either of these companies, but that they pay precisely the same charge for switching service as does any other railroad Company in Minneapolis having track

connection. The Supreme Court of Minnesota, in its opinion (Rec., 112), says "The rates for switching described in the contract have since been advanced, and the provision for rebates is no longer effective."

(f) That if any other railroad company having equal facilities of access to the mills at Minneapolis with the railway of the Minneapolis Company shall satisfactorily do the switching for the St. Paul Company and the Omaha Company to said mills, then the Minneapolis Company, with the consent of the St. Paul Company and the Omaha Company, will do the switching for such railroad company over its railway on the same terms that switching for the St. Paul Company and the Omaha Company is done over such other railroad, but in such case the price for switching by the Minneapolis Company shall be uniform to all and without rebate to anyone.

This last provision of the agreement, if ever effective, has long since been deprived of its potency, as stated in the opinion of the Supreme Court of Minnesota (Rec., 112).

Whatever bearing this agreement in the early history of the Minneapolis Company might have had upon the questions, whether the Minneapolis Company and its railway tracks are part of the system of the St. Paul Company and the Omaha Company, and whether these two companies control the affairs and operations of the Minneapolis Company, is not now of any importance, for each and every of its provisions that could be interpreted as effecting a control of the Minneapolis Company by the St. Paul Company and the Omaha Company, or either of them, has long since been abrogated either by statutes or by long continued practice, and has ceased to be effective.

It is respectfully submitted that the finding that the Minneapolis Company and the tracks operated by it are part of the system of the St. Paul Company and the Omaha Company, and that said tracks are operated by said companies as part of their terminals, is not supported by the evidence, and as the judgment of the court below rests upon this erroneous finding, and will, if enforced, deprive the Minneapolis Company of substantially the greater part of its earnings and impose upon the St. Paul Company and the Omaha Company, respectively, the duty to operate and maintain the tracks of the Minneapolis Company and make deliveries thereon without any charge therefor other than the rate for its line haul into Minneapolis from points in Minnesota, these companies and each of them will be deprived of their property without compensation, and without due process of law, in violation of Section I of the Fourteenth Article of the Amendments to the Constitution of the United States.

THE SUPREME COURT OF MINNESOTA ERRED IN REFUSING TO HOLD THAT THE ORDER OF THE RAILROAD AND WAREHOUSE COMMISSION WAS UNREASONABLE AND UNLAWFUL, IN THAT IT DEPRIVED THE ST. PAUL COMPANY AND THE OMAHA COMPANY OF THE RIGHT TO REMOVE THE ALLEGED DISCRIMINATION BY IMPOSING LIKE CHARGES ON TRAFFIC DELIVERED TO, AND RECEIVED FROM, MILLS AND ELEVATORS LOCATED ON THE TRACKS OF EACH OF SAID COMPANIES, IN VIOLATION OF SECTION 1, ARTICLE XIV, OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

(Presenting the Seventh Specification of Error.)

In support of this specification of error, these plaintiffs adopt and make a part of this brief, the argument set forth at length

in the separate brief of the plaintiffs Chicago, St. Paul, Minneapolis & Omaha Railway Company and Minneapolis Eastern Railway Company dealing with this particular subject.

THE ORDER OF THE RAILROAD & WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA APPEALED FROM IMPOSES A BURDEN UPON, AND DISCRIMINATES AGAINST INTERSTATE COMMERCE, IN VIOLATION OF PARAGRAPH THREE, SECTION EIGHT OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES AND IN VIOLATION OF THE ACT TO REGULATE COMMERCE AS AMENDED.

Assignments of Error Nos. V and VI are here considered specially.

It is our contention that the order appealed from burdens interstate commerce and requires the plaintiffs in error to discriminate against interstate shippers in violation of Section 2 of the Act to Regulate Commerce and to discriminate against localities outside the boundaries of the State of Minnesota and give preferences to localities inside the boundaries of the State of Minnesota in violation of Section 3 of said Act.

The Act to Regulate Commerce does not permit a carrier to discriminate in favor of intrastate commerce and against interstate commerce even where the order of a State Regulating Body requires it so to do.

American Express Company v. Caldwell, 244 U. S. 617.

Shreveport Case, 234 U. S. 342.

The Act to Regulate Commerce preserves certain legal rights of the carriers subject to the Act, among which is the right of one carrier to deny to another the privilege of publishing through rates to or from points on its line without first having obtained its formal consent in the way of a concurrence in such published through rate or a joining in the through rate.

In Re Coal Rates, etc., 26 I. C. C. 168, 173.

N. Y., N. H. & H. R. R. Co. v. Platt, 7 I. C. C. 323, 332.

Under the order 'appealed from the line haul carriers, the St. Paul Company and the Omaha Company, are required to publish rates to destinations on the rails of the Minneapolis Company without obtaining its consent and without regard to whether the Minneapolis Company publishes tariff rates or demands compensation for the use of its rails or its services, all to the end that intrastate shippers and intrastate localities will be relieved of the lawful charges that the Minneapolis Company may publish and collect on interstate shipments of competitors and from interstate localities thus discriminated against.

Section 6 of the Act to Regulate Commerce as amended in 1906 provides as follows:

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act, shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party."

That the Minneapolis Company is a common carrier subject to the Act to Regulate Commerce under the admitted facts of this case is made clear by the decision in *Chicago Junction Railway Company v. U. S.*, 226 U. S. 286.

The original record in this case, pages 91 *et seq.* and printed record pages 17 *et seq.* in the evidence of Witness J. H. Foster, contains the undisputed facts of how the Minneapolis Company is organized and is officered, where its rails lie, that it is an operating road, that it files tariffs with the Interstate Com-

merce Commission and that it makes the required reports to the Interstate Commerce Commission in accordance with forms prescribed by that Commission. In addition the Supreme Court of Minnesota, in its statement of facts, as a preliminary part of its opinion, states that the Minneapolis Company is an *operating common carrier*.

In short, it is a fact established by the evidence and undisputed of record that the Minneapolis Company is a common carrier engaged both in interstate and intrastate railway operations for the shipping public. Under Section 6 of the Act to Regulate Commerce there is reserved to it the right to require the line haul carriers on interstate shipments to make only such through rates as it is a party to or concurs in,—this for the double purpose.

(a) Of advising the shipping public of all factors of the through rate, and

(b) To secure it in its compensation for the services rendered.

Under the order appealed from it may claim its full rights on interstate shipments as preserved to it by Section 6 of the Act to Regulate Commerce but it must waive its right to publish and collect charges on intrastate shipments. The intrastate shipper receives the benefits therefrom and the interstate shipper suffers from the resulting discrimination of the road being forced to forego its right to charge in the one instance and standing on its right to charge in the other instance.

Another right preserved to interstate common carriers by the Act to Regulate Commerce is the right to make a separate terminal charge where the service of another carrier must be obtained in order to make the terminal delivery.

See *Iron Ore Rate Cases*, 41 I. C. C., 181, 200, where the following language is used:

"For services that a carrier may render or procure to be rendered off its own line, or in addition to the ordinary transportation service over its own line, it may

charge and receive compensation. *Southern Railway Co. v. St. Louis Hay Co.*, 214 U. S., 297, 301; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105. Speaking of the carrier's right to make a separate terminal charge the court in *Interstate Commerce Commission v. C. B. & Q.*, 186 U. S., 320, 335, 336, said:

* * * We see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce wherein it is provided that the schedules of rates to be filed by carriers shall 'state separately the terminal charges and any rules or regulations which could in any wise change, affect, or determine any part of the aggregate of said aforesaid rates and fares and charges.' * * * The purpose of this provision was to compel the schedules to be so drawn as to plainly inform of their import, was to exact that when the rates were changed the change should be so stated as not to mislead and confuse." * * *

Under the authorities cited above and under the facts of record in this case, the order of the Commission appealed from herein is in conflict with the Commerce Clause of the Constitution and the Act to Regulate Commerce in the following particulars, namely:

The St. Paul Company and the Omaha Company must haul and deliver intrastate shipments cheaper than interstate shipments where the distances and service are substantially the same. On interstate shipments the carriers may lawfully add to the through freight rate \$1.50 per car charge of the Minneapolis Company.

In *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 106, the following occurs:

"It cannot be in reason said that the inherent reasonableness of the terminal rate, separately considered, is irrelevant because its reasonableness is to be determined by considering the through rate and the terminal charge contained in it. * * * The tariff schedules of appellees make clear the separate terminal charge for delivery from their own lines to the Union Stock Yards. * * *

Further, it is shown by the affidavits that the amount of such terminal charge is not entered upon the general freight charges of the companies, but is kept as a separate item. The Union Stock Yards Company is an independent corporation and the fact, if it be a fact, that most or even all of its stock is owned by the several railroad companies entering into Chicago does not make its lines or property part of the lines or property of the separate railroad companies. * * *

Under those circumstances, it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

Under the reasoning foregoing the right of a carrier to add to its transportation charge the published tariff rates of the switching line which it must pay in order to make delivery for the shipper to a destination beyond its rails and on the rails of the switching line seems to be well established. The Interstate Commerce Commission, in its interpretation of this feature of the Act to Regulate Commerce, uses the following expression :

"For services that a carrier may render or procure to be rendered off its own line or in addition to the ordinary transportation service over its own line it may charge and receive compensation" (*Iron Ore Rate Case, supra*).

It is right here that we find direct conflict between the Commerce Clause of the Federal Constitution as carried out by the Act to Regulate Commerce, on the one hand, and the regulation of the State Commission of Minnesota, on the other. The

Minnesota Commission has said to the carriers:

"You shall not charge the shipper what you must pay the Minneapolis Company for making delivery of a shipper's shipment to a point beyond your rails and on its rails."

The Federal Regulating Body, the Interstate Commerce Commission, has said:

"For services that a carrier may * * * procure to be rendered off its own line * * * it may charge and receive compensation."

This Court has upheld the Interstate Commerce Commission's interpretation of this feature of the law in the cases cited above.

The following are concrete illustrations of the discrimination that is thus wrought against interstate commerce:

(a) On a line of the St. Paul Company, North La Crosse, Wisconsin, and La Crescent, Minnesota, are but two miles apart. On shipments from North La Crosse to Minneapolis for delivery on the rails of the Minneapolis Company the shipper may lawfully be charged for the delivery on the rails of that carrier the sum of \$1.50 per car. The competitor of that shipper, on the Minnesota side of the line, ships intrastate virtually the same distance, his car hauled over the same road and in the same train, delivered to the same destination, is exempted from the charge of \$1.50 per car for delivery on the rails of the Minneapolis Company. Such is the effect of the order appealed from.

(b) The Omaha Company has on its line the town of Bigelow at the Southern Minnesota line and just over the line in Iowa the town of Sibley. The difference in distance to Minneapolis is negligible but the shipper from Bigelow gets transportation service \$1.50 per car cheaper than his competitor at Sibley though the two cars move in the same train and over the same rails to the same destination.

Perhaps the discrimination is even more clear when we con-

sider that it is not the difference in through rates, strictly speaking, that constitutes the discrimination. The actual discrimination is in the fact that the carriers will charge as they lawfully may, \$1.50 per car to the interstate shipper for the terminal service in Minneapolis, while to the state shipper that service is a gratuity. He is given something of value for nothing, while his competitor must pay what it is worth.

By the foregoing illustrations the distinction is pointed out between the case at bar and the case of *Chicago, Milwaukee & St. Paul Railway Company v. State Public Utilities Commission of Illinois*, 242 U. S. 333. In that case the court said the relationship of discriminatory charges were "not established by the evidence" and "the certainty that it (the discrimination) will operate to the injury of those engaged in such commerce is not made to appear."

In the case at bar it would be sheer sophistry to contend that to charge one shipper \$1.50 per car for specific service and and give that service to another shipper as a gratuity is not discrimination, or to contend that such discrimination would not operate to the injury of the interstate competitor. Not only does it operate against the individual shipper, but it operates against localities and markets. The elevator man at Ortonville, on the Minnesota side of the line, is able to pay \$1.50 more for grain than his competitor at Big Stone City, just across the State line who must ship interstate. Thus the discrimination against localities, prohibited by Section 3 of the Act to Regulate Commerce, as well as the discrimination against persons, prohibited by Sections 2 and 3, is involved in the order appealed from.

The case at bar is distinguished from the court's decision rendered January 14, 1918, in *Illinois Central Railroad Company v. Public Utilities Commission of the State of Illinois, et al.*, in that we have here no state statute governing the subject of the litigation while such a statute was involved in the

Illinois Passenger Rate Case. Furthermore, in the case at bar the Commission's order appealed from goes beyond rate regulation and assumes to pass upon property rights and corporate obligations.

In the Illinois Passenger Rate Case, referred to, the court say:

"It is obvious that an order of a subordinate agency such as the Commission should not be given precedence over a state rate statute otherwise valid unless and except so far as it conforms to a high standard of certainty."

In the case at bar not only is the "state rate statute" absent but the proof contains the "high standard of certainty" that the interstate shipper, under the existing lawful tariffs, is required to pay \$1.50 per car more than the intrastate shipper will be permitted to pay if the order appealed from should be put into effect.

Still another burden is placed upon interstate commerce by the order appealed from in this, that the Minneapolis Company is an instrumentality of interstate commerce as well as state commerce. Its instruments and facilities are instruments and facilities devoted to interstate commerce as well as to state commerce. Yet under the order the only tariffs it can publish and enforce as against the shipper are interstate tariffs.

The interstate shippers must support the Minneapolis Company. The state shippers need not contribute thereto. When the burden that should be borne equally or equitably is shifted wholly upon interstate commerce by the order appealed from, the unlawful burdening of interstate commerce by State Regulation is an established fact—not a theory.

The following expressions of this court are in point:

"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations

of such carriers from being made a means of injury to that which has been confided to the Federal care."

Houston & Texas Ry. v. U. S., 234 U. S. 342, 351.

"The Supreme Court of South Dakota declares:

"If the purported order of the Commission does, in any respect, regulate intrastate commerce, it is to that extent void owing to the Commission's want of jurisdiction over the subject-matter."

That court denies not only the intent of Congress to confer upon the Commission authority to remove an existing discrimination against interstate commerce by directing a change of an intrastate rate prescribed by state authority; but denies also the power of Congress under the Constitution to confer such power upon the Commission or to exercise it directly. The existence of such power and authority should not have been questioned since the decision of this court in the *Shreveport Case*."

American Express Company v. Caldwell, 244 U. S. 617, 624.

"That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."

Houston & Texas Ry. v. U. S., 234 U. S. 342, 354.

It follows that under the undisputed facts and decisions of this court the effect of the order appealed from is a discrimination against interstate shippers, a preference to intrastate shippers, a discrimination against interstate localities, a preference to intrastate localities and a burdening of interstate

commerce in contravention of the Commerce Clause of the Constitution of the United States and the express provisions of the Act to Regulate Commerce specified above.

It is respectfully submitted that the judgment rendered herein should be reversed.

O. W. DYNES AND

F. W. ROOT,

*Attorneys for Plaintiff in Error,
Chicago, Milwaukee & St. Paul Railway Company.*

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The order complained of is arbitrary and unreasonable and if enforced will impair and deny the plaintiffs their constitutional guarantees in that—

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SUPREME COURT

OF THE

United States

OCTOBER TERM, 1916

NO. 712.

**Chicago, Milwaukee & St. Paul Railway Company;
Chicago, St. Paul, Minneapolis & Omaha Rail-
way Company and Minneapolis Eastern Rail-
way Company,**

Plaintiffs in Error,

VS.

Minneapolis Civic & Commerce Association,

Defendant in Error.

**Brief for Plaintiffs in Error Chicago, St. Paul, Minne-
apolis & Omaha Railway Company and Minne-
apolis Eastern Railway Company.**

STATEMENT.

This is a writ of error to review the judgment of the Supreme Court of Minnesota, and involves the constitutionality of an order of the Railroad & Warehouse Commission of that state. Defendant in error asserts a right, sustained by the judgment below, to compel the railways, plaintiffs

herein, to supply the use of their property and to perform switching services without compensation. The plaintiffs herein appealed from said order to the District Court of Hennepin County, Minnesota, and that court, after hearing, affirmed said order. An appeal was thereafter taken to the Supreme Court of Minnesota, where the judgment of the District Court of Hennepin County was affirmed. To review that judgment this writ of error was prosecuted. The facts material for consideration, are concisely stated in the findings of fact and conclusions of law forming the basis of said order and are as follows:

This petition was brought on behalf of the Minneapolis Civic & Commerce Association for the purpose of having the Commission determine that the Minneapolis Eastern Railway Company, (hereafter called the Minneapolis Company), is a part of the terminals of the Chicago, St. Paul, Minneapolis & Omaha Railway Company (hereafter called the Omaha Company) and the Chicago, Milwaukee & St. Paul Railway Company (hereafter called the St. Paul Company), and to forbid the imposition of a switching charge of \$1.50 per car upon all line haul traffic transported by said Omaha Company and St. Paul Company, which is handled by the Minneapolis Company, and to require the defendants to publish and maintain switching tariffs applicable to local or industrial traffic which shall be fair and reasonable in and of themselves, the same to apply to and from all industries served by the Minneapolis Company without assessment of separate or additional

charges therefor. No testimony was presented which challenged the reasonableness of the charges made by the Minneapolis Company in and of themselves, and hence that part of the petition is dismissed without further consideration. After considering all the evidence, the Commission finds:

1. That the Minneapolis Civic & Commerce Association is a corporation duly organized under the laws of the State of Minnesota, and has as its object and purpose the general betterment of civic, commercial and industrial conditions in the city of Minneapolis, and the territory thereof and adjacent thereto.

2. That the Omaha Company is a corporation organized under the laws of the State of Wisconsin, and operates as a common carrier 1,672.71 miles of railroad, of which 431.72 miles are within the State of Minnesota, and that it has important and extensive terminals within the city of Minneapolis.

3. That the St. Paul Company is a corporation organized under the laws of the state of Wisconsin and operates as a common carrier 9,373.31 miles of railroad, of which 1,241.75 miles are within the State of Minnesota, and that it has important and extensive terminals within the city of Minneapolis.

4. That the Minneapolis Company is a corporation organized under the laws of the State of

Minnesota in 1878, and that its articles of incorporation were, on the 27th day of January, 1879, amended so that the general nature of its business was "the building and operating a railway from the city of Minneapolis in the county of Hennepin, and State of Minnesota, to the city of St. Paul, in the county of Ramsey, in said state, with branches connecting with any and all railroads now built or hereafter to be built or secured or constructed to or into said cities or either of them; also branches to mills and manufactories in said cities or either of them; the said railway and branches to be constructed and operated with one or more tracks and with all necessary side tracks, turn-outs and connections, and with all necessary roadway, right of way, depot grounds, yards, machine shops, warehouses, elevators, depots, station houses, structures, buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway." Said railroad claims to own 4.75 miles of railroad and *actually operates but 2.63 miles thereof*, of which 1.07 is main track and 1.56 miles is yard track and sidings. The balance of 1.02 miles is located on the East side of the Mississippi River and is now operated by the Great Northern Railway Company. The Company was organized by the millers of Minneapolis and all of the members of the first board of directors were engaged in the milling business. About four years after its organization the Omaha Company and St. Paul Company became the owners thereof by each acquiring one-half of its capital stock, then issued to the amount of \$30,000.00. Instead

of paying dividends on this stock from 1882 to 1906 the Company invested its surplus amounting to \$95,000.00, in improvements and additions and in 1906 it capitalized these investments and the stock then issued was equally divided between its stockholders. The original issue of 7% first mortgage bonds in the sum of \$150,000.00 was guaranteed by the Omaha Company and St. Paul Company, and these were refunded by the issue of 4½% bonds in the same amount on January 1, 1909, of which \$75,000.00 is owned by the Omaha Company and \$75,000.00 by the St. Paul Company. Interest upon the bonds is paid regularly to the railroad companies.

5. That the Minneapolis Company serves numerous large industries which are located upon its tracks, and that the receiving and delivering of line haul cars to and from the Omaha Company and St. Paul Company is of great advantage to said Companies, as it enables them to control important traffic to and from mills and elevators. That the following named industries are located upon the tracks of the said railway: Barber Milling Company, "Cataract Mill"; New Occidental Milling Company, "Occidental Mill"; Northwestern Consolidated Milling Company, "B" Mill, "C" Mill, "D" Mill, "E" Mill, "H" Mill, "Excelsior Warehouse"; Pillsbury Flour Mills Company, "C" Warehouse, "B" Mill, "B" Elevator, "Palisade Mill"; Washburn Crosby Company, "D" Mill.

6. That the rate fixed in the tariff of the said Minneapolis Company for handling inbound carloads of \$1.50 per car, and for outbound carloads ten cents per ton with a minimum of \$1.50 per car, and that grain is the principal inbound and flour the outbound shipment; that said Company issues no billing upon freight and makes no direct charge against a shipper, except in a few cases.

7. That large mills and elevators in Minneapolis are also located upon the tracks which are exclusively owned and controlled by the Omaha Company and by the St. Paul Company, and that the service performed in handling cars to and from said mills and elevators is substantially the same as that which is performed in the handling of cars to and from the Minneapolis Company; that the charge made by the Omaha Company, or the St. Paul Company for delivering a car of grain to a mill or elevator located upon the tracks of the Minneapolis Company is \$1.50 per car in addition to the line rate from the point of origin, while there is no charge made by either Company in addition to the line rate for delivering a car to a mill or elevator located upon the rails exclusively operated by the Omaha Company or the St. Paul Company.

8. That by its absorption tariff the Omaha Company and the St. Paul Company absorb the switching charge made against all outbound carloads upon which it enjoys a line haul coming from the mills and elevators located upon the tracks of

the Minneapolis Company, and that from a practical standpoint shippers of inbound grain are the only persons who have to pay the charge of the Minneapolis Company.

9. That the Minneapolis Company is *managed and operated* by its board of directors who are now and for a long period of time have been officers of the Omaha Company and the St. Paul Company and who receive their entire compensation from said railway Companies. That the *general control* of said Company is in charge of a managing committee consisting of Mr. A. W. Trenholm, General Manager of the Omaha Company, and Mr. J. H. Foster, General Superintendent of the St. Paul Company. A superintendent is employed and he hires the switchmen, enginemen, car repairers and other employees, and they are paid by the Minneapolis Company. The Company owns its own equipment and performs services for all railroads on equal terms.

10. That the said Minneapolis Company files its annual reports and its tariff with the Interstate Commerce Commission and the Minnesota Railroad and Warehouse Commission as provided by law, and pays taxes to the State upon its gross earnings, and in said reports it claims to be a switching road and claims that the control by the Omaha Company and St. Paul Company is direct.

11. That the tracks *operated by the Minneapolis Company* are an important, convenient and

necessary terminal facility for the Omaha Company and St. Paul Company, and that said companies do directly influence, control and operate said company.

As a conclusion of law from the foregoing facts, the Commission finds that the certain 1.07 miles of main line track and 1.56 miles of yard tracks and sidings including ground and all railway facilities, which are *operated by the Minneapolis Company*, is a part of the terminal property of the Omaha Company and the St. Paul Company; that it is the duty of said railway companies, and each of them, without charge, to deliver to, or receive from industries located upon said terminals, car-load shipments upon which they, or each of them, receive a line haul; that the charge of \$1.50 per car on inbound grain which is delivered to mills and elevators located upon the rails *now operated by the Minneapolis Company* gives an unlawful and unjust preference and advantage to mills and elevators located upon the rails which are exclusively owned by the Omaha Company and the St. Paul Company.

It is therefore ordered that the Omaha Company and the St. Paul Company and the Minneapolis Company, and each of them, cease and desist from charging \$1.50 per car for handling inbound shipments over the lines of the Omaha Company and the St. Paul Company and each of them, which are delivered by the Minneapolis Company to mills or elevators located upon the tracks *now operated by the same*, or delivered by said company to connecting carriers and

That said Minneapolis Company cease and desist from charging \$1.50 per car or any other sum for delivering carload shipments of freight moving from connecting carriers to the Omaha Company or St. Paul Company, or each of them, or from mills and elevators located upon the tracks *now operated by said Minneapolis Company* to said Omaha Company and St. Paul Company, or each of them, and

That said Omaha Company and St. Paul Company, and each of them, be, and the same are hereby required to operate said main track, yard track and sidings as a part of the terminal property of each of said railroads within the city of Minneapolis. This order shall apply only on intrastate shipments of freight, and shall take effect on the first day of February, A. D. 1915. (Transcript, Folios 66 to 74 inclusive.)

The facts found by the trial court and conclusions of law based thereon were substantially the same as were the findings and conclusions of the Railroad Commission. (Folios 241-249.) There were no disputed facts, and the evidence conclusively showed that the Minneapolis Company was officered by a President, Vice President, Secretary, Treasurer and Board of Directors consisting of nine members. Two of its directors were not employed by and were not connected with either the St. Paul or Omaha Companies. Its other directors were employes or officers of one or the other of said companies. Its By-Laws provided for the appointment of a managing committee, to whom was delegated the management and control of all the operations of the

Company. (Folio 326.) The direct operations of the Company were in charge of a Superintendent, who hired and discharged all switchmen, enginemen, sectionmen, car repairers, and other employes, and reported directly to the managing committee. This committee was in the actual and exclusive possession of the property, rails, engines and cars of the Company and had direction and control of all of its employes. The Company, through the managing committee, made its own contracts, kept its own accounts, collected its own revenues and paid its own operating expenses. It filed its own tariffs with the State and Interstate Commerce Commissions and maintained its separate corporate identity by making reports to both commissions. It had its accredited agent at Washington, as required by the Commerce Act, and secured free transportation for its officers and employes with the approval of the Interstate Commerce Commission. It was separately amenable to all laws, state and federal, and to the orders of both commissions. It paid a corporation tax to the Federal Government, a gross earnings tax to the State, and its property was separately valued by the State. All taxing, regulating and legislative bodies dealt with it as an independent corporation and had, with no exception, recognized its rights as a separately operated railroad. The evidence showed conclusively that neither the St. Paul Company, nor the Omaha Company, nor any of their officers, directly or indirectly, ever controlled or directed the policy or operations of the Minneapolis Company or the action of its officers,

and that its Managing Committee was in the actual possession of its railroad and actually operating its property to the exclusion of all other railroads. (Folios 105, 106, 145 and 146).

The plaintiffs herein contend that the conclusion of law that certain parts of the property operated by the Minneapolis Company constituted a part of the terminal property of the St. Paul and Omaha Companies is not supported by the findings of fact and is contrary to law; that said order is arbitrary and unreasonable and not justified by public necessity and if affirmed, will deprive the plaintiffs and each of them, of their property without compensation and without due process of law.

SPECIFICATION OF ERRORS.

(I)

The Supreme Court of Minnesota erred in refusing to hold that the order of the Railroad and Warehouse Commission was arbitrary and unreasonable and not justified by public necessity, and if enforced, would deprive plaintiffs in error, and each of them, of their property without compensation and without due process of law, in violation of Section 1, Article 14 of amendments to the Constitution of the United States.

(II)

The said Supreme Court erred in refusing to hold that the order of the Railroad and Warehouse Commission was unreasonable and unlawful in that it compels the St. Paul Company and the Omaha Company to operate the tracks of the Minneapolis Company without compensation, thereby depriving them of their property without compensation, and without due process of law, in violation of Section 1, Article 14 of the amendments to the Constitution of the United States.

(III)

The Railroad and Warehouse Commission having expressly found that no testimony was presented which challenged the reasonableness of the charges imposed by the Minneapolis Company, and having dismissed the complaint in so far as

the reasonableness of said charges were involved, the order of said Commission directing the discontinuance of said charges, if enforced, would take the property of the plaintiffs in error, and each of them, without due process of law, in violation of Section 1, Article 14 of the amendments to the Constitution of the United States, and said Supreme Court erred in entering a judgment sustaining said order of the Commission.

(IV)

The order of the Railroad and Warehouse Commission deprives the St. Paul Company and the Omaha Company, and each of them, of their contractual rights as stockholders of the Minneapolis Company to manage its own business, use its own property and to impose and collect reasonable charges for services rendered, in contravention of Section 10, Article 1 of the Constitution of the United States, and said Supreme Court erred in sustaining said order.

(V)

The said Supreme Court erred in refusing to hold that said order was unreasonable and unlawful in that it deprived the St. Paul Company and the Omaha Company of the right to remove the alleged discrimination by imposing like charges on traffic delivered to and received from mills and elevators located on the tracks of each of said Companies, in violation of Section 1, Article 14 of the amendments to the Constitution of the United States.

(VI)

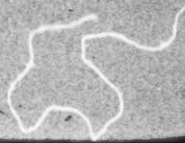
The said order of the Railroad and Warehouse Commission imposes an unjust burden upon interstate commerce and discriminates against interstate commerce and in favor of state commerce, in violation of paragraph 3 of Section 8 of Article 1 of the Constitution of the United States, and said Supreme Court erred in refusing to set aside said order and in entering judgment sustaining said order.

(VII)

The said order of the Railroad and Warehouse Commission imposes an unjust burden upon interstate commerce and discriminates against interstate commerce in favor of state commerce, in contravention of an act entitled, An Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof, and is more particularly in contravention of Sections 1, 2, 3, 6, 13 and 15 thereof as amended, and said Supreme Court erred in refusing to set aside said order and in entering a judgment sustaining said order.

(VIII)

The said Supreme Court erred in holding that the judgment of the District Court of Hennepin County, affirming said order of the Railroad and Warehouse Commission finding the property of the Minneapolis Company to be the property of



the St. Paul Company and the Omaha Company, was not a confiscation of the property of the Minneapolis Company and a deprivation of its property without due process of law and contrary to Section 1, Article 14 of the amendments to the Constitution of the United States.

(IX)

The said order of the Railroad and Warehouse Commission deprives the Minneapolis Company of its rights secured by charter, granted by the State of Minnesota, to conduct its business of a common carrier, to control its property, to collect reasonable compensation for its transportation service, and to meet its obligations, thereby impairing the obligation of its charter contract, in violation of Section 10, Article 1 of the Constitution of the United States, and said Supreme Court erred in sustaining said order.

ARGUMENT.

I

The order of the Commission compelling the Minneapolis Company to surrender the possession and operation of its property to its stockholders, and compelling the latter to operate the same without compensation, is arbitrary and unreasonable and if enforced will deprive the Plaintiffs herein, and each of them, of their property without due process and without compensation.

(Presenting the first, second, third and eighth specifications of error.)

In support of these contentions the plaintiffs herein submit the following considerations:

(1)

The ownership of all the capital stock of one corporation by another, and officers in common, do not impair the corporate entity of either, or transfer the control of either to the other, or merge the properties of the two corporations.

General principles of law applicable to corporations related by stock ownership and officers in common, have been so well established and consistently observed that it will suffice to briefly state them without elaboration. It is settled that a corporation is an entity, irrespective of the persons who own all its stock. The fact that one person owns all does not make him and the corporation one and the same. Shares in a corporation

constitute a species of property entirely distinct from the corporate property. A shareholder has no individual title to the moneys or property of the corporation, nor any actual control over it. Shares of stock are essentially distinct from the corporate property, and the owner of all the stock of a corporation does not own the corporate property or become entitled to manage or control it. Stockholders of a corporation do not control its property. On the contrary, the control thereof is in the corporation itself and its officers and agents vested with such control by virtue of the by-laws of the corporation. Stockholders may control a corporation, but the latter alone controls its property. They are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body and that body controls its property. The fact that one corporation exercises a controlling influence over another through the ownership of its stock or through the identity of its stockholders, does not operate to make either the agent of the other or to merge the two corporations into one.

Humphreys v. McKissock, 140 United States
304,

Pullman Car Co. v. Mo. Pac. Railroad, 115
U. S. 587,

Peterson v. Rock Island Railroad, 205 U. S.
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In re Watertown Paper Co. 169 Fed. 252,
Richmond Construction Co. v. Richmond Rail-
road, 68 Fed. 105,

Monongahela Bridge Co. v. Traction Co. 196
Penn. St. 25,
Ulmer v. Lime Rock Railroad, 98 Me. 579,
Stone v. Cleveland Railroad, 202 N. Y. 353.

(2)

The fact that most, or even all, of the capital stock of a Terminal Company is owned by its connecting carriers does not make its lines or property part of the lines or property of such carriers.

The principles announced in the foregoing decisions were recognized and applied by this court in the case of *Interstate Commerce Commission v. Stickney*, 215 U. S. 98. For the first time those principles were applied to a case involving the reasonableness of rates and the validity of an administrative order. The facts and issues in that case were very similar, if not identical, with the facts and issues in the case at bar. Special emphasis is therefore laid upon that case as controlling some, if not all, of the issues in this case. The facts of that case were that the Union Stock Yards and Terminal Company was organized by the railroads entering Chicago. They subscribed for and took most of its capital stock and assumed to and actually did manage the Company and its property. They elected the directors of the Company as representatives of the roads in the management thereof. The Company built the tracks necessary to connect the railroads with the Union Stock Yards. These yards furnished the only market

for live stock in Chicago, and were therefore, not only important and convenient terminal facilities for the roads but indispensable ones. The Terminal Company owned no engines and performed no transportation service, and the railroads actually operated its tracks by running their own engines and cars thereon. For many years the roads made no charge for transporting stock over the tracks of the Terminal Company, their published rates, including delivery at the stockyards. In 1894, they first sought to impose upon shippers a charge of \$2.00 per car for such service, and filed and posted their own tariffs fixing that charge. On complaint and after hearing, the Interstate Commerce Commission held that such charge was unreasonable and unduly discriminatory (*Cattle Raisers Association v. Railroads*, 12 I. C. C. Reports 507). The enforcement of this order was enjoined by the Circuit Court of the Eighth Circuit, and on appeal to this court counsel for the Commerce Commission, in their efforts to sustain the order, contended among other things, that the Terminal Company and its stock owning roads were one and the same; that the property of that Company constituted a part of the terminals of such railroads and that the terminal charge of \$2.00 per car was unreasonable and unjustly discriminated against Chicago in favor of other places where no terminal charge was imposed. This court refused to sustain these contentions and held, among other things, that—

“The Union Stock Yards Company is an independent corporation, and the fact, if it be a fact,

that most, or even all, of its stock is owned by the several railroad companies entering into Chicago, does not make its lines or property part of the lines or property of the separate railroad companies."

This court further held that a carrier may charge and receive compensation for services that it may render, or procure to be rendered, on its own line, or outside of the mere transportation thereover, and that while a terminal charge is reasonable, it cannot be condemned or the carrier charging it be required to change it because prior charges of connecting carriers make the total rate unreasonable.

In that case, as in the case at bar, the facts as to the control of the Terminal Company by the railroads were very similar. In both cases, the terminal rate was assailed as unreasonable and unduly discriminatory. In both, the contention was made that the terminal rate was, or should be, included in the line haul rate. The two cases, however, differ in two essential facts. In the Stickney case, the railroads actually operated their engines and cars over the tracks of the Terminal Company and imposed the rates for such service by their own tariffs. The Terminal Company owned no engines, performed no transportation service, and imposed no charge for the service rendered by the railroads. In this case, the Minneapolis Company actually operated its own engines and property to the exclusion of all railroads and imposed the rates in its own tariffs for the service performed by it. (Folio 70).

The Stickney case squarely meets and denies the contention that stock control of a terminal road by connecting carriers and officers in common merge the property of the former with that of the latter. Such denial was necessary to sustain the judgment rendered. If this court had sustained that contention, its decision would have upheld the order of the Interstate Commerce Commission, and not have reversed it. The law as recognized and applied in that decision cannot therefore, be disposed of as obiter. The decision has never been overruled or distinguished and appears to be conclusive of the issues in the case at bar.

(3.)

The contract of October 25th, 1878, did not transfer the property of the Minneapolis Company to its stockholders or place them in charge of its operation.

This contract and amendment thereto will be found on pages 141 to 144 of the record and was made the basis of the decision of the State Supreme Court. It was executed before the Omaha and St. Paul Companies acquired control of the stock of the Minneapolis Company, and *expires by its terms on May 1st, 1918 (Folio 318)*. It conferred no greater control on the Omaha and St. Paul Companies over the Minneapolis Company, than did the ownership of all of its capital stock, which they acquired in 1882 (Folio 69). Neither the Commission nor the trial court made any find-

ing thereon, or made any reference thereto in their findings. Ever since these companies acquired control of the stock, this contract has been a dead letter and no one of its provisions has been recognized or enforced. Laws passed since its execution have nullified many of its provisions, and the rates, rebates and preferred services provided for therein have long since been illegal and have been abolished. This contract is in fact a relic of the days when railroads were not restricted by law, and intense rivalry existed. Each railroad was hostile to all others and on the alert to guard against their encroachments. This was specially true of the Omaha and St. Paul Companies, who then, as now, were competing for business and watchful of each other's doings. When this contract was executed, they were fighting their way into Minneapolis and were seeking every possible advantage of the one over the other. Each, as a consideration for purchasing the stock and bonds of the Minneapolis Company, demanded and secured equality of service and charges, as well as security for its investment. The contract was accordingly drawn so as to prevent either from securing control of the Minneapolis Company to the exclusion or prejudice of the other, and it is in the light of these facts that the contract must be read. The first section thereof provides that only 300 shares of the stock of the Minneapolis Company shall be issued, 145 shares to C. H. Pettit as trustee, one share each to the five directors residing at Minneapolis, 75 shares to the St. Paul Company and 75 shares to the Chicago, St. Paul & Minne-

apolis Company. It will be noted that neither of the railroads thereby acquired control of the stock and that their joint holdings did not give them such control. The fifth section provides for the sale of bonds, each of the railroads taking one-half thereof; and the proceeds to be expended in the construction and equipment of the Minneapolis Company. The sixth section provides that each of the railroads shall receive the same service and pay the same charges, and to insure such equality, that the superintendent in charge of operation shall be appointed with the consent of all the parties to the contract. This provision, however, was abrogated by an amendment to the by-laws adopted in 1887, providing that the directors shall select a managing committee consisting of two of their number who shall have charge and *control of all the operations* of the Minneapolis Company. (Folio 326). Ever since the railroads acquired their stock, a miller or banker has held the office of president of the Minneapolis Company and of its board, and has thereby prevented either railroad from securing control of the Company's operations. The seventh section provides for a switching rate, and the eighth section is indefinite in language and uncertain in meaning. Laws long since enacted have nullified the provisions of both sections. Read in the light of the conditions existing when executed, and the state of the law, this contract does not prove, or tend to prove, that the property of the Minneapolis Company is owned by or is a part of the property of its stock holding railroads or that they, or either of them, operate

its property. On the contrary, the Commission and trial court found that the Company "actually operated" the property involved herein (Folios 68, 302). This finding is inconsistent with and a denial of the claim that the stock holding railroads are operating the property or have control of the operations of the Minneapolis Company by virtue of this contract. At most it confers on the stock holding roads control over the corporation as such, but it certainly confers no control over its operations different from that possessed by them as stockholders. The law clearly distinguishes the control of the corporation from the control of its operations, and the finding of fact herein as to operation is conclusive upon that question.

The State Supreme Court laid stress on the decision in *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498. It seems to us that this case is clearly distinguishable from the one at bar. In that case the Commission found that a lease of a part of the property of the Southern Pacific to a shipper, gave the latter an undue advantage over other shippers, and ordered the lease to be cancelled. The Terminal Company sought to enjoin the enforcement of the order on the grounds that it was not engaged in interstate commerce and that the Commerce Commission acted without jurisdiction. This court refused the injunction and held that the Commerce Commission had jurisdiction to regulate the charges of the Terminal Company. The evidence disclosed that the Southern Pacific

System, in effect owned the property of the Terminal Company and *actually operated* its property, performing all the transportation service. That there may be no misunderstanding, attention is directed to the evidence which established the fact of ownership and operation. The property upon which the Terminal Company constructed its tracks, was deeded to Huntington, President of the Southern Pacific, upon the express condition that terminal facilities should be constructed thereon for the use of the Southern Pacific System (500) and the same condition was contained in the deed of the Huntington heirs to the Terminal Company (518). Thereafter an ordinance was passed by the City of Galveston, vacating all streets on the property and granting to the Terminal Company the perpetual right to construct and maintain thereon "terminal facilities for the use of what is commonly called the Southern Pacific Railroad and Steamship System" (500). Thereafter a special act of the legislature, setting out this ordinance in full, relinquished to Huntington the title of the state to the property, upon the express conditions contained in the ordinance (501). The foregoing deeds, ordinance, and legislative act, in effect dedicated this property to the use of the Southern Pacific System and effectually made it a part thereof. It further appeared that the Terminal Company owned no cars or engines and did not operate its tracks or perform any transportation service. Its tracks were actually operated by one of the railroads of the Southern Pacific System which switched all cars thereon

and exacted of the public a charge of \$1.75 per car. (503). The Terminal Company published no schedule of charges for transportation service. It did publish a schedule of charges for its wharfage service (503). The dedication of this property to the use of and the actual operation thereof by the Southern Pacific System were of themselves sufficient grounds for holding that it constituted a part of the terminals of that "System," and clearly distinguish that case from the case at bar. The decision of the court could not and should not have been otherwise, as we understand the law. The questions of stock ownership, stock control and officers in common, were only incidentally involved and were only discussed in connection with the question of ownership and operation. It must therefore be apparent that the decision of this court, holding that the Terminal Company was a part of the Southern Pacific System has little or no bearing on the issues presented in this case.

(4.)

The finding that the Minneapolis Company actually operated its property is conclusive on the issues of this case and distinguishes it from all decisions relied on by the defendant.

Special emphasis is laid on the fact that the commission and trial court found, and the undisputed evidence conclusively established, that the property of the Minneapolis Company was "actu-

ally operated" by it through its board of directors and managing committee (Folios 68, 71, 242). The by-laws of the Company directly imposed on its managing committee the management and control of all operations (Folio 326). All reference in the findings of fact and conclusions of law to its property described it as "operated by" the Minneapolis Company. In the eleventh finding, the commission and the court found "that the tracks *operated* by the Minneapolis Eastern Railway Company are an important, convenient and necessary terminal facility" (Folios 72, 246). In their one conclusion of law they describe the property of the Company as the main line, yards, tracks and sidings, including grounds and all railway facilities "which are *operated* by the Minneapolis Eastern Railway Company" (Folios 72, 247). Thereafter, referring to the location of certain mills and elevators, they describe them as located "upon the rails *now operated* by the Minneapolis Eastern Railway Company" (Folios 73, 247), and again, they describe the tracks and property of the Minneapolis Company as the tracks "*now operated* by that Company" (Folios 73, 74, 248). It is evident that neither the commission nor the court used this language inadvertently from the fact that they both ordered the St. Paul and Omaha Companies to operate the property of the Minneapolis Company. If those roads were operating this property when the order was made, there was no need to order them to do that which they were then doing.

The laws regulating railroads do not deal with the owners of the capital stock, or the lessors or mortgagees out of possession. They do not deal with the property of a railroad as distinguished from the corporation, or with leased lines, branch lines or subsidiary lines not actually operated by the owners thereof. On the contrary, they deal with the persons or corporations actually operating the property. For this reason the owner of a railroad, after leasing it to another, is not liable for his disregard of law or the character of the charges imposed by him. This is obviously true because the interests of the public are concerned with the operating company, and not ordinarily with the stockholders of such company.

The commission and trial court, appreciating they could not make an order binding on the Omaha and St. Paul Companies so long as the Minneapolis Company operated its own property, transferred the operations thereof to the roads, and after doing so imposed upon them the duty of operating the property without compensation. Such an order is clearly a taking without due process. So far as we can ascertain, this is the first time a commission or court has ever assumed to exercise such power. If the Minneapolis Company was "actually operating" its property, it cannot be deprived thereof and forced to lose the revenues therefrom without compensation. On the other hand, if the Omaha and St. Paul Companies were operating the property, the order was properly directed to them. The order, however, must run against the operating company, otherwise it is unreasonable and unlawful.

(5.)

The conclusion of law made by the Commission and trial court that the property of the Minneapolis Company was a part of the terminal property of its stockholding roads, is unsupported by any finding of fact and is contrary to law.

If the ownership of all the capital stock of one corporation by another and officers in common do not make the property of one the property of the other, it must follow that there was no finding of fact to sustain the conclusion of law that the property of the Minneapolis Company was a part of the property of its stockholding roads. The only finding giving color to this conclusion was that the tracks operated by the Minneapolis Company were important, convenient and necessary terminal facilities of the St. Paul and Omaha Companies. There was no evidence to support this finding, and if there were, it does not sustain the conclusion of law that the tracks of the Minneapolis Company were in fact a part of the terminal property of the railroads. It must be self-evident that the property of that Company is no more an important, convenient and necessary terminal facility of the St. Paul and Omaha Companies than it is of the other seven railroads operating in Minneapolis. The terminal property of each of the seven railroads furnish just as important, convenient and necessary terminal facilities for the St. Paul and Omaha Companies as does the property of the Minneapolis Company. This is clearly established

by the undisputed evidence. (Folios 105, 147).

Assuming that this conclusion of law has no finding of fact for its support and is necessary to sustain the order, we contend that the order manifestly is unreasonable and unlawful and should be reversed.

II.

Said order, if enforced, will deprive the Minneapolis Company of its charter right to conduct its own business, control its own property, collect its own charges and settle its own obligations, and will deprive the St. Paul and Omaha Companies of their contractual rights as stockholders to have that Company manage its own business by and through its Board of Directors.

(Presenting the fourth and ninth Specifications of Error.)

The Minneapolis Company was organized to build and operate a railroad, and in accordance with the purpose of its organization built and equipped, and has since operated the property involved in this order, and has conducted its business as a common carrier of interstate and intrastate commerce, and as such has complied with the laws of the state and of the United States applicable to such carrier. For thirty-five years it has imposed and collected the charges complained of. For many years past annual statements of the St. Paul, Omaha, and Minneapolis Companies to the Interstate Commerce Commission and State Railroad Commission have shown their relationship and have set forth the stocks and bonds of other

companies, severally owned and held by them, as well as the names of the directors and officers of each of the said Companies. In this and in other ways has such ownership and relation been published so that the public was chargeable with full knowledge thereof. Neither the legislative nor the administrative departments of state, by statute or other proceeding, has ever questioned the right or power of the Minneapolis Company to impose and collect the charges complained of.

This order, if enforced, will accomplish the following results :

1. It will *deprive* the Minneapolis Company of the *right to transact the business for which it was organized*, although it has in every way complied with the law and at all times made reasonable charges for its services.

2. It will *deprive* the Minneapolis Company of the *possession and use* of its property without compensation.

3. It will *prevent the officers* of the Minneapolis Company from *performing their duties*, and *compel it to discharge its employees*.

4. It will deprive the Minneapolis Company of all means of *paying its bonded and other indebtedness*.

The right of immunity from confiscation is not the only right of property safeguarded by the Con-

stitution. As was said by Justices Pitney and Van Devanter, in their dissenting opinion in *Wilson v. New*, 243 U. S. 332, 386:

"Rights of property include something more than mere ownership and the privilege of receiving a limited return from its use. The right to control, to manage, and to dispose of it, the right to put it at risk in business, and by legitimate skill and enterprise to make gains beyond the fixed rates of interest, the right to hire employes, to bargain freely with them about the right of wages, and from their labors to make lawful gains—these are among the essential rights of property, that pertain to owners of railroads as to others. The devotion of their property to the public use does not give to the public an interest in the property, but only in its use."

Adair v. United States, 208 U. S. 161, 180.

So far as we have been able to find, this is the only case where a Commission has undertaken to deprive a corporation, that has done nothing to forfeit its legal rights, of the right to conduct its own business in a lawful way, to use its own property in its business, to receive the earnings of its own property and to pay its own obligations; and has undertaken to compel the stockholders thereof to take its business and property out of the management and control of its duly constituted Board of Directors, when such Board has transacted the corporate business in a legal and proper manner. The Commission, acting as a judicial tribunal, in a collateral proceeding, has revoked the franchises

and forfeited the charter of the Minneapolis Company without winding up its affairs as required by law.

The stockholders of the Minneapolis Company have a right to urge every objection that could be urged by the corporation itself. Their shares of stock are property, and they are entitled under the law to have such rights protected. The corporation has the right to transact its business as a carrier of interstate and intrastate commerce through its Board of Directors, and the stockholders have the right to demand that the corporation perform the object of its organization in the way and through the agencies prescribed by law. They have the right to insist that the property of the corporation shall be used and managed for corporate purposes by the Board of Directors, and that the obligations of the corporation shall be met by the corporation itself. No precedent or law can be cited that would authorize a commission or court, in the absence of mismanagement by the Board of Directors, to order the stockholders in person to seize the corporate business and the corporate property, and personally perform all corporate functions. That is exactly what this order will accomplish. It is therefore, in our opinion, an arbitrary and unreasonable exercise of power, not justified by public necessity.

III

Said order imposes an unjust burden upon Interstate Commerce and unduly discriminates against it in favor of intrastate commerce in contravention of Paragraph

Three of Section Eight of Article One of the Constitution of the United States and of an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof.

(Presenting the sixth and seventh Specifications of Error.)

In support of the foregoing propositions, these plaintiffs adopt and make a part of this brief, the argument set forth at length in the separate brief of the plaintiff Chicago, Milwaukee & St. Paul Railway Company, dealing with the issues arising thereunder.

IV.

The order of the Commission was unreasonable and unlawful in that it deprived the St. Paul and Omaha Companies of the right to remove the alleged discrimination by imposing a charge of \$1.50 per car on cars delivered to and received from industries located on the tracks of either of said railroads.

(Presenting the Fifth Specification of Error.)

For the argument the assumption will be made that the St. Paul and Omaha Companies own and operate the property of the Minneapolis Company and that its property is a part of their terminals. The order of the Commission peremptorily directs the St. Paul and Omaha Companies to cease imposing a charge of \$1.50 per car on cars delivered to or received by them from industries located on the rails of the Minneapolis Company, for the reason that they make no charge for a like service rendered by them for industries located on their

own rails and thereby discriminate against the industries located on the rails of the Minneapolis Company. It is absolute in form and is therefore arbitrary and unreasonable.

Great Northern Railway Co. vs. Minnesota,
238 U. S. 340.

This decision involved the validity of an order of the Minnesota Railroad and Warehouse Commission, peremptorily directing the Great Northern Railroad to install stock scales at the station of Bertha, on the ground that its failure to do so, resulted in discrimination against Bertha and in favor of those stations at which the Great Northern railroad had voluntarily installed such scales. The Great Northern railroad contended that if there was any discrimination, it was entitled to remove it by taking out the scales at the other points, if it so desired, instead of installing them at Bertha. In sustaining its contention, this Court said:

“The railway company does not presently controvert the finding that scales at Eagle Bend and Hewitt brought about discrimination, but maintains the Commission acted arbitrarily and unreasonably in seeking to eliminate this by peremptorily requiring construction of another without giving opportunity to accomplish the same result through discontinuing the use of those already installed. This contention is sound and must be sustained. Conceding power to inhibit discrimination, the Commission could not exercise it unreasonably by needlessly taking property,

or, what comes to the same thing, obliging incurrence of expense wholly unnecessary. It by no means follows, simply because a railroad voluntarily supplies a convenience at some station which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty; but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order precluded use of this method to bring about lawful conditions, and therein, we think, was plainly arbitrary and unreasonable." (pp. 346-347.)

Houston & Texas Railway v. United States,
234 U. S. 342.

A railroad is no more bound to furnish transportation at less than a reasonable rate, than it is bound to furnish non-transportation facilities. Any obligation to furnish either can exist only because it furnishes the one or the other under discriminatory conditions, and its obligation is limited to removing the discrimination by the alternative of furnishing the one or the other to the persons discriminated against, or by discontinuing so furnishing them to the persons favored. If it be assumed that the St. Paul and Omaha Companies own and operate the property of the Minneapolis Company and that its property is a part of their terminal property, and that there is, in fact, discrimination, the Commission acted arbitrarily and unreasonably in seeking the elimina-

tion of such discrimination by peremptorily ordering them to cancel the charge on cars to and from industries located on the rails of the Minneapolis Company, without giving them the option of eliminating the alleged discrimination by making like charges on cars to and from industries located on their own rails. As the Interstate Commerce Commission has said:

"A practice that is bad only because discriminatory, can always be remedied by withdrawing the benefit from the favored party or by extending it to the injured party." (28 I. C. C. R. 318, 324.)

The line haul rates to and from Minneapolis over the rails of the St. Paul and Omaha Companies, in effect when the order involved herein was made, were the statutory maximum rates prescribed by Section 4299 of the General Statutes of Minnesota for 1913, reading as follows:

"The following are hereby established and declared to be the reasonable maximum rates to be charged by railroad companies as common carriers of property in the State of Minnesota for the transportation, in carload lots, of the commodities belonging to the classes named in Section 1 of this Act, between stations in the State of Minnesota, for the distances named in the following schedule, to-wit: (Here follows tables of distances, rates and commodities by classes.)

Chapter 90 Laws of 1913, made distance the rigid measure of all rates, and Chapter 367 Laws

of 1915, amendatory thereof, provided, among other things, as follows:

"The maximum rates shall not apply to switching or drayage rates. The Commission may define switching and drayage service to apply to the movement of traffic within and between points and fix reasonable maximum rates for the same which shall be independent of any rates that may be made for line haul transportation, and in making the said rates the Commission shall not be governed entirely by the distance principle established by this act."

There was neither finding nor evidence that the Minnesota Railroad Commission ever required railroads to include in their line haul rates, deliveries to industries located on their rails, and no such order was in fact ever made.

The foregoing statutes prescribe the rates from station to station and constitute a legislative declaration that such rates are reasonable. They specifically provide that the maximum rates prescribed shall not apply to switching rates, thereby recognizing that such service is different from and additonal to the transportation from station to station. They present a different issue from that involved in the Los Angeles Switching Case, 234 U. S. 294, and call for special consideration.

Under said statutes, it follows that railroads have the right to impose a charge for service rendered after transportation to the station has terminated. The Commission found in effect that the charges of the Minneapolis Company were reason-

able. (Folio 67). Assuming as we must, that the line rates established by statute were reasonable, this finding of the Commission implies that the terminal service rendered by the Minneapolis Company was additional to the line service. The Commission also found that the service rendered by the Minneapolis Company was substantially the same as that rendered by the Omaha and St. Paul Companies in switching to and from the station of Minneapolis to industries located on their own rails. (Folios 70, 71). If the service be the same and the charge therefor be reasonable, those companies have the right and should be permitted to make such charge. The fact that heretofore they have performed this service without compensation does not and should not forever prevent them from securing compensation therefor.

The state Supreme Court disposed of this contention with the statement that the terminal charge of the line companies was embraced in the line rate and was provided for by the tariffs of the line companies. This statement is unsupported by any finding or evidence and is contrary to the facts. If, in fact, the tariffs did contain such provision, they are subject to amendment as permitted by the law of the State. The Omaha and St. Paul Companies insist that the order of the Commission should have been in the alternative, permitting them to remove the alleged discrimination either by abolishing the charge on cars delivered to or received from industries located on the tracks operated by the Minneapolis Company, or by imposing a like charge on cars to

and from industries located on their own rails. If this be true, it follows that the order was arbitrary and unreasonable, and if sustained will deprive said plaintiffs of their property in contravention of Section One, Fourteenth Amendment to the Constitution.

In conclusion, the contentions of the plaintiffs summarized and restated, are as follows:

(1) The findings of the Commission as to stock ownership and officers in common do not sustain the conclusion of law that the property of the Minneapolis Company is a part of the property of the stock owning roads.

(2) The said conclusion is not supported by the findings of fact, and is contrary to law.

(3) The finding that the Minneapolis Company actually operated its property is inconsistent with and avoids the conclusion that its property is a part of the property of the stock owning roads.

(4) The order if enforced, will impair and defeat the contractual rights of each plaintiff.

(5) The order if enforced, will unjustly burden interstate commerce and unduly discriminate against that commerce in favor of intrastate commerce.

(6) The order is peremptory and should have been in the alternative, permitting the stock owning roads to abolish the switching charge on traf-

fic to and from industries located on the rails of the Minneapolis Company, or to impose a like charge on traffic to and from industries located on their own rails.

In view of the foregoing considerations, plaintiffs assert that said order is arbitrary and unreasonable, and if enforced, will impair and deny said plaintiffs their constitutional guarantees.

The plaintiffs therefore, respectfully submit that the judgment rendered herein, by reason of the errors assigned, should be reversed and the case remanded with directions.

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CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY ET AL. *v.* MINNEAPOLIS CIVIC
AND COMMERCE ASSOCIATION.

ERROR TO THE SUPREME COURT OF THE STATE OF
MINNESOTA.

No. 283. Argued May 1, 2, 1918.—Decided June 10, 1918.

Two railroad companies, between them owning all the stock and controlling completely the property and operations of a third company, which had legal title to terminal tracks, caused separate switching charges to be made in its name on traffic moved by them over those tracks, although for substantially the same service over terminals which each owned separately, neither made any charge in addition to its line-haul rates. A state commission, finding that the practice discriminated against shippers on the third company's tracks, ordered that the separate charges be discontinued and that the tracks be operated as a part of the terminal properties of the other companies, in intrastate traffic. *Held:* (1) Upon examination of the findings and evidence, that the commission and the courts below were justified in holding the third company a mere agency or instrumentality of the other two; (2) that its technical corporate individuality and its technical ownership of the tracks in question did not entitle it to be treated as an independent carrier, and that the order did not deprive it or the other companies of property without compensation or due process of law; (3) that the order imposed no unlawful burden on interstate commerce.

134 Minnesota, 169, affirmed.

THE case is stated in the opinion.

Mr. James B. Sheean and *Mr. O. W. Dynes*, with whom *Mr. F. W. Root*, *Mr. William H. Norris* and *Mr. Edward M. Hyzer* were on the briefs, for plaintiffs in error.

Mr. Frank J. Morley, with whom *Mr. Clifford L. Hilton*, Attorney General of the State of Minnesota, and

Mr. Lyndon A. Smith were on the briefs, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

We shall adopt the designation of the parties which is used in the record: the Chicago, Milwaukee & St. Paul Railway Company as the "Milwaukee Company;" the Chicago, St. Paul, Minneapolis & Omaha Railway Company as the "Omaha Company;" the Minneapolis Eastern Railway Company as the "Eastern Company;" the Minneapolis Civic and Commerce Association as the "Civic Association," and the Railroad & Warehouse Commission of the State of Minnesota as the "Commission."

This proceeding originated in a petition filed by the Civic Association with the Commission against the three railway corporations plaintiffs in error, in which it is alleged that the tracks of the Eastern Company are mere switching or terminal facilities, in the City of Minneapolis, of the Milwaukee and Omaha companies, and that an unreasonable extra charge is made for the receipt and delivery of cars over them. The prayer is that the plaintiffs in error be required to treat the tracks of the Eastern Company as if they were a part of the terminal systems of the Milwaukee and Omaha companies, and that they be required to publish and maintain fair and reasonable tariffs applicable to traffic moving over them.

A hearing upon this petition resulted in findings of fact by the Commission, among others: that the Eastern Company was then operating only one mile of main track and one mile and a half of yard track and sidings in the City of Minneapolis; that the Milwaukee and Omaha Companies each owned one-half of its capital stock and were in control of its operations; and that, assuming to be

an independent railroad company, the Eastern Company had filed tariffs with the Interstate Commerce Commission and with the Minnesota Commission, pursuant to which it was charging and collecting, in addition to the line rate from point of origin, an extra charge of \$1.50 per car for inbound loaded cars and ten cents per ton, with a minimum of \$1.50 per car, for outbound loaded cars, moving over its tracks.

As conclusions of law the Commission found that the tracks of the Eastern Company were a part of the terminal property of the Milwaukee and Omaha companies; that it was the legal duty of these companies to deliver cars to and to receive them from industries on the tracks of the Eastern Company without charge other than that made for the line haul; and that the extra charge which the Eastern Company was making resulted in discrimination against inbound shippers of grain to industries located upon its tracks.

Upon these findings of fact and conclusions of law the Commission entered an order, requiring that the three companies cease charging \$1.50 per car for inbound shipments over either the Milwaukee or Omaha lines which are delivered over the Eastern Company's tracks to industries located upon them or to connecting carriers; that the Eastern Company cease from charging any sum for delivering carload shipments of freight moving from connecting carriers to the Milwaukee or Omaha companies, or moving from mills and elevators located on the Eastern Company's tracks to the Milwaukee or Omaha companies; and that the Omaha and Milwaukee companies in the future shall operate the tracks of the Eastern Company as a part of the terminal property of each of them in the City of Minneapolis. The order is made applicable only to intrastate shipments of freight.

On appeal to a state district court the order of the Commission was affirmed and adopted as the order of the

court, and the decision of the Supreme Court of Minnesota affirming this judgment is now before us for review.

The contention of the railway companies in this court is stated by them "to be reduced to the single proposition:" That the Supreme Court of Minnesota erred in affirming the judgment of the District Court in finding, as did the Commission, that "the tracks operated by the Eastern Company are important, convenient and necessary terminal facilities of the Milwaukee and Omaha companies, and that these companies directly control and operate the Eastern Company;" and in adjudging, "that the Milwaukee and Omaha companies be required to operate the Eastern Company's tracks as a part of their terminal property at Minneapolis, without making any extra charge for moving traffic over them."

Review by this court is prayed for on the ground that to give effect to the judgment and order of the Minnesota court will deprive each of the three railroad companies of its property without compensation and without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and, earnestly insisting that the findings of fact upon which the judgment proceeds are without support in the evidence, the plaintiffs in error urge that it be determined from the entire record before us whether substantial evidence was introduced to sustain the denial of their claimed federal right. *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 566; *Jones National Bank v. Yates*, 240 U. S. 541, 552.

Thus, the question presented for our decision is whether the Eastern Company, in form a corporate entity, separate and distinct from the Milwaukee and Omaha companies, is in reality an independent carrier, exercising an independent control over the railroad to which it holds the legal title and over the conduct of its business affairs, or whether it is a mere agency or instrumentality of the two corporations, which own all of its capital stock,

through which they collect an extra charge from the public for rendering by indirection a service which as common carriers they are legally required to render without such charge under the conditions of operation which prevail at Minneapolis.

It is obvious that this is a mixed question of fact and of law, and from the findings of fact as made by the Commission and by the District Court, which differ only in unimportant details, and from evidence undisputed in the record, we derive the following statement, which we think embraces all that is essential to a decision of the case.

The Eastern Company is a Minnesota corporation, with an authorized capital stock of one million dollars, organized in 1878 for the declared purpose of building and operating a railroad from the City of Minneapolis to the City of St. Paul, with branches connecting with all railroads now built or hereafter to be built to or into said cities, and with branches to the mills and manufacturing establishments located therein.

The formal organization of the company was by a group of mill-owners, but before any right of way was acquired or construction work done the Milwaukee and Omaha companies came into exclusive control of the corporation and a board of directors satisfactory to them was elected, with the result that the only road which the company ever built or operated (omitting small fractions) was one mile of main track and one mile and a half of yard track and sidings in the City of Minneapolis. At the time of the trial the Eastern Company served several mills and warehouses and one elevator, it had no stations or freight depots, its only rolling stock was two engines, and the average number of its employees varied from twenty to thirty men. Its tracks are used for interchange by the Milwaukee and Omaha lines, but other companies use them for this purpose to such a limited extent, that the part of the Commission's order relating to such use is

neglected in the evidence and arguments and in the decisions of the state courts.

Almost immediately after the organization of the Eastern Company, the three companies entered into a written contract, effective for over 39 years, until May 1, 1918, which is of much significance in determining the decisive fact in the case, as we have stated it.

This contract provides:

(1) That only 300 shares of the authorized 10,000 shares of capital stock of the Eastern Company shall be issued, and of these, 75 shares each must be issued to the Omaha and Milwaukee companies, 145 shares to a trustee for the Eastern Company, and the remaining 5 shares shall be issued as qualifying shares to directors. The 145 trust shares "shall not be transferable except by the written consent of all (3) said parties hereto, and any transfer thereof without such consent shall be void and of no force or effect."

(2) The Eastern Company shall execute in proper form 150 bonds of \$1,000 each and a mortgage on all the property and franchises of the company to secure their payment. The Milwaukee and Omaha companies agree each to purchase, at 80% of their par value, one-half the amount of such of these bonds as it may be necessary to issue to pay for the right of way, construction and equipment of the railroad;

(3) That the Milwaukee and Omaha companies shall have "equal and the same rights in and to the said railway . . . in all respects;" that they shall pay the same charge for switching their respective cars by said railway, and that no partiality or favor shall be shown to either;

(4) That the superintendent having charge of the operation of the railroad, shall be appointed "by the consent and mutual agreement of all the parties to these presents;"

(5) That the Eastern Company shall charge all parties one dollar for switching each loaded car, but a rebate of fifty per cent. of this charge shall be made to the Milwaukee and Omaha companies;

(6) If any other company having equal facilities with the Eastern Company for reaching mills in Minneapolis shall promptly and satisfactorily do the switching for the second and third parties (the Milwaukee and Omaha companies) then the Eastern Company with the written consent of the Omaha and Milwaukee companies, will do switching for such railroad companies over the said railroad of the Eastern Company on the same terms that switching is done for the said second and third parties (the Milwaukee and Omaha companies) over such other railroad but without rebate to any company.

It is quite true, as is argued, that some of the provisions of this contract have been departed from, and that others have been rendered unlawful and void by statutes enacted, and by decisions of courts rendered, since its date. But this does not lessen its evidential value in determining whether the interest of the Milwaukee and Omaha companies in the Eastern Company was that of mere stockholders in an independent public service corporation or whether they intended to and did exercise the power which they possessed as stockholders to immediately and directly control the property and the conduct of the business of the Eastern Company.

Whether because the Milwaukee and Omaha companies distrusted each other or for other cause, it is plain that this contract was designed to take away from the Board of Directors of the Eastern Company, the usual and lawful governing body of a corporation, the normal legal control of the company's affairs in several most important respects. It deprived the Board of the power: to issue the capital stock of the company and to finance its affairs; to select a superintendent to operate the company's two

and one-half miles of track, by requiring that such selection be made only with the consent and mutual agreement of the three companies; to make mutual agreements for the interchange of business with any other company except with the mutual consent of the Milwaukee and Omaha companies; and it renders one-half (save five shares) of the stock which it permits to be issued, transferable only with the written consent of the Milwaukee and Omaha companies. Thus, the making of this contract was an obvious surrender by the Eastern Company of substantially all freedom of corporate action and an assumption of control over that company by the Milwaukee and Omaha companies, which converted it largely into a mere agency or instrumentality for doing their bidding.

That this preliminary program of control was carried forward to realization is abundantly shown by the record.

An accumulated surplus of \$95,000 was distributed by the Eastern Company in the form of stock dividends in 1906, by dividing it equally between the Milwaukee and Omaha companies, and when the original seven per cent. loan of \$150,000 was refunded into a four and one-half per cent. loan the new bonds were taken equally by the two companies. Thus the equal interest of the two owning companies and the financial dependence of the Eastern Company were maintained.

The management and control of all the operations of the Eastern Company has always been kept in charge of a "Managing Committee" of two members, one of whom for many years before the evidence was taken was the general manager of the Omaha Company and the other the general superintendent of the Milwaukee Company. The Eastern Company did not pay either of these men any salary for their services.

The auditor of the Omaha Company has been the auditor of the Eastern Company, which paid no part of

his salary, and the established practice has long been for the one bookkeeper of the Eastern Company to take his journal and ledger to the auditor of the Omaha Company monthly for verification.

Seven of the nine directors of the Eastern Company at the time the evidence was taken were officers either of the Milwaukee or Omaha company; the eighth, the attorney of the Eastern, had desk room in the Milwaukee Company's legal department, of which he had recently been a member; and the ninth director, the president, was not an employee of either of the two owning companies.

With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public.

The record further shows that the Milwaukee and Omaha companies separately own many tracks in Minneapolis, on which large mills and elevators are located and that they render to such industries "substantially the same service" as is required in delivering and receiving cars to and from like industries on the Eastern Company's track for which they make no charge whatever in addition to the line-haul rate. The general manager of the Omaha Company, who was one of the two members of the "Managing Committee" of the Eastern Company, testifies that the line-haul rate to Minneapolis on the Omaha line "includes switching to any industry on its tracks" in that city regardless of the relative distance or expense of such delivery; that this rule prevails at all points on the Omaha line; that, generally

speaking, this is the custom of all railroads, and that if the Eastern tracks were exclusively owned by the Omaha Company deliveries to and from industries located upon them would be made without any switching charge additional to the line-haul rate. The Milwaukee Company also delivers on tracks exclusively owned by it at Minneapolis, without charge additional to the line-haul rate.

The Eastern Company, assuming the character of an independent common carrier, pursuant to tariffs filed, collects the switching charge, which is objected to, of \$1.50 per car on inbound loaded cars and a charge of ten cents per ton, with a minimum charge of \$1.50 per car on outbound loaded cars, which move over its tracks, in addition to the line-haul rate. But the practice of the Milwaukee and Omaha companies (with negligible exceptions) is to "absorb" this extra charge made against outbound cars, so that as both the Commission and the Court find, "from a practical standpoint shippers on inbound grain are the only persons who have to pay the charge" of the Eastern Company.

The Eastern Company does not issue bills of lading and does not make any collection from shippers, but charges its switching rate against the Omaha and Milwaukee companies, and it is paid by them from the line-haul rate on outbound traffic, and from the line-haul rate plus the switching charge, which they also collect, on inbound grain. Under such a system of doing business, the controversy in the case really relates only to the charge of the Eastern Company on inbound grain, for as to all other traffic the charge by the Eastern Company is simply a bookkeeping one which does not involve any extra switching charge to the shipper. Thus, the charge of the Eastern Company, when paid by the shipper in addition to the line-haul rate, is obviously a discrimination against industries located on the Eastern Company's

tracks when compared with those similarly situated on other industrial spur delivery tracks which are wholly owned by either company.

This discussion of the evidence in the case renders it very clear that the purpose of the Milwaukee and Omaha companies from the beginning was to construct and operate but one track to the group of industries to be served, instead of each building and maintaining its own track, and to construct and use that track in common so that each might have the benefit of it as fully as if it were the sole owner. To accomplish this end they resorted to the familiar device of incorporating the Eastern Company, and in order that their purpose might not be defeated in the future, by the design or business necessity of either company, the contract between them which we have discussed, was entered into to prevent the corporate organization of the Eastern Company and the control of its operations from being changed by either owning company without the consent of the other, and the evidence makes it very clear that all through its corporate life the Eastern organization has been consistently used as a mere agency of the two owning companies to accomplish their original purpose.

Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two. *Pullman's Palace Car Co. v. Missouri Pacific Ry. Co.*, 115 U. S. 587; *Peterson v. Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 391; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 413; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 108; and *United States v. Delaware, Lackawanna & Western R. R. Co.*, 238

U. S. 516, 529, 530, and it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valueless its capital stock owned by the Milwaukee and Omaha companies.

While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 273, and *United States v. Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516. In such a case the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies. The order of the Commission affirmed by the Supreme Court of Minnesota, so far from being arbitrary, is plainly just, and clearly it does not deprive the plaintiffs in error of their

property without compensation or without due process of law, by requiring, as it does, that for ratemaking purposes the Milwaukee and Omaha companies shall extend to shippers over their tracks the legal title to which is in the Eastern Company, equality of treatment with that which they give to shippers over their separately owned tracks, where similar service is rendered.

The claim that an unlawful burden is imposed upon interstate commerce by requiring that the one delivery track here involved shall be treated with respect to intrastate traffic precisely as many other similarly used and situated tracks have always been treated by the owning companies is too unsound to merit consideration.

The judgment of the Supreme Court of Minnesota is
Affirmed.